ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION

A STUDY ON
SPECIAL AND DIFFERENTIAL TREATMENT IN WTO AGREEMENTS

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PREFACE

The work programme on international trade law in general and WTO issues in particular occupy an important place in the AALCO’s agenda. Reflective of the potential that international cooperation holds in the area of international trade and the optimistic impulses invoked by the globalization process, the AALCO has continuously monitored the developments within the World Trade Organization. Specific aspects studied by the Organization in the past include WTO’S dispute settlement mechanism; intellectual property rights; and electronic commerce. The present study is an exercise on similar lines.

The Uruguay Round of Multilateral Trade Negotiations that culminated in the establishment of the World Trade Organization (WTO), witnessed developing and least developed countries take up new and onerous obligations inter alia in the areas of trade in services, intellectual property rights and investment measures. Central to these new commitments was the expectation engendered by the special and differential (S&D) treatment provisions - some 145 provisions spread out over 30 WTO Agreements. In a rule-based system as the WTO, S&D provisions are perceived as useful tool, which recognizes the asymmetry of developmental levels and economic power among countries and hence serves as an incentive for developing countries to actively participate in the system and partake benefits of it. To what extent such aspirations have been met is the subject of this study. The context for this study is provided by the ongoing efforts within the WTO to review and render the existing S&D provisions more precise, effective and operational.

In view of the practical utility as well as the contemporary relevance of this topic, the Secretariat decided to undertake this study. For obvious reasons it was deemed appropriate that the study should be undertaken by the recently activated AALCO’S Center for Research and Training. This is the first study of this kind initiated by the Center and we look forward to continuing this pattern of producing a series of such studies and research papers on international law issues, as and when appropriate.

I wish to place on record my thanks and deep appreciation for my colleagues Dr. Li Zhenhua, Deputy Secretary-General, Mr. R. Vidjea Barathy, Senior Legal Officer and Mr. R. Rajesh Babu, Legal Officer, for their commitment, professionalism and inspiring team work in bringing out this study.

It is my fond hope that this study would be a valuable addition to the existing literature on the subject and promote a better understanding of the complexities surrounding the legal and economic implications of S&D treatment provisions under the WTO group of Agreements.

3 June 2003
New Delhi

Amb. Dr. Wafik Z. Kamil
SECRETARY GENERAL
I. INTRODUCTION

The AALCO Secretariat has since the inception of the World Trade Organization monitored and reported on the developments relating to the multilateral treaty system. Over the years, the focus of AALCO’s studies has primarily been on the WTO’s Dispute Settlement Mechanism and the Agreement on Trade Related Intellectual Property Rights.

At the 40th Session of the AALCO, the Organization directed the Secretariat, in the light of its ongoing work related to WTO, “to examine and identify relevant legal issues that could appropriately be considered within the framework of AALCO’s Work programme”. Accordingly, the AALCO Secretariat presented a few topics for the consideration of the 41st Session of the Organization. The topic so identified were:

(a) Interpretative clarifications emanating from disputes involving various WTO Agreements e.g. agriculture; IPRs, anti-dumping, services etc.

(b) Procedural and evidentiary aspects of the WTO Dispute Settlement Understanding; and

(c) Survey of the operationalisation of “special and differential treatment” for developing country Members in the context of the WTO dispute settlement process.

This proposal was welcomed by the delegates at that Session.

It may be recalled that at the WTO’s fourth Ministerial Conference held at Doha, Qatar, the Ministers had agreed to review all special and differential treatment provisions “with a view to strengthening them and making them more precise, effective and operational”.

Against this backdrop, the AALCO Secretariat decided to undertake a study on the topic of Special and Differential Treatment under the WTO Agreements. The study, the first of its kind, was carried out under the auspices of the AALCO’s Centre for Training and Research (CTR).

It may be noted that the deadline for the completion of the negotiation process on Special and Differential Treatment (hereinafter referred to as S&D) provisions was set to be 31 July 2002. By the end of July, Member States could agree on only one out of nearly 90 proposals that was submitted for consideration. Pursuant to this, the General Council was forced to extend the deadline till 31 December 2002.1 The developing country Members had made it known that their attitude towards the new negotiation process would depend on the outcome of the review of special and differential treatment provisions. The present study is intended to provide an update of the negotiation process of S&D treatment. Proposals for review of S&D treatment provisions are considered both

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1 In the General Council meeting held on 31 July 2002, the WTO country Members officially agreed to extend the review of special and differential treatment for developing country Members until 31 December 2002, TN/CTD/3.
in the Committee on Trade and Development as well as the respective subsidiary bodies. Yet, owing to the primary role that the Doha Declaration assigns to the Committee in Trade and Development (CTD), the present study, besides defining and outlining the evolution of the concept of S&D treatment, gives its focus on the consideration of the developments within the CTD.²

The paper is structured as follows: Section II defines the concept of special and differential treatment as understood in international law, more specifically in international trade law; section III attempts to trace out the development of the concept of special and differential treatment in international trade law in general and General Agreement on Tariff and Trade, 1947 (GATT 1947) in particular; section IV provides a comprehensive overview of the S&D treatment provisions within the important WTO Covered Agreements; and a brief analysis and some comments are provided in section V.

II. SPECIAL AND DIFFERENTIAL TREATMENT: THE CONCEPT

One of the fundamental principles of international law is the principle of sovereign equality of States according to which, all States have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature. This principle represents the principle of formal equality in international level. While formal equality upholds the political independence of States in the international plane, it fails to recognize the huge and constantly widening gap that exists between them in the economic and social sphere.

Thus, international law has to address this issue and find some new principle, which treats the States not only equally, but also equitably. The principle of Special and Differential treatment emerged to meet the demand as the time required. It is an important principle, which enables weak and less developed Members to integrate in the international community by granting them special advantages and flexibilities. The differentiation refers to a situation where obligations for different groups of States are dissimilar, or to specific measures designed to help States implementing obligations similar for all. The rationale of this concept is not to create permanent exception but a temporarily legal inequality to wipe out an inequality in fact.

Differential treatment evolved mainly in the economic sphere (especially in United Nations General Assembly and United Nations Conference for Trade and Development (UNCTAD)) where the developing countries argued for economic independence. The developing countries argued that to overcome the economic stagnation they underwent under the colonial rule and the present international economic system built in the course of colonialization process, less-developed countries need special treatments to gain economic independence. The focal point of this struggle for economic independence culminated in the UN General Assembly Resolution on “Permanent Sovereignty over Natural Resources” (PSNR) and “the Declaration of a New International Economic Order” (NIEO) and various international commodity agreements in the 1970’s, which have laid the foundation for the whole regime of S&D treatment in international law.

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4 “Formal equality” posits that all subject of the law should be treated in a similar fashion.
5 In the South West Africa case, Judge Tonaka (in his dissenting opinion) opinioned that “to treat unequal matters differently according to their inequality is not only permitted but required” ICJ Reports (1966) p. 6; Further, the principle of distributive justice warrants that disadvantageous subjects of law be given special treatment. See Principle 10 of the Declaration on the Progressive Development of Principles of Public International Law relating to a New International Economic Order, in International Law Association, Report of the Sixty-Second Conference (1987), p. 2, cited in Phillippe Cullet, p. 555.
8 GA Res. 3201 (S-VI)
In the initial stages, when developing country demands on a New International Economic Order (NIEO) were raised in political forums like the UN General Assembly, they were met with lukewarm and indifferent responses from the developed world. Later, however, we see a more open stance whereby special and differential treatment for developing countries gradually became seen as offering leverage for inducing developing countries’ participations in areas like international trade, exploration of natural resources and international environmental law – areas where the convergence of interests between the developed and developing country blocks were seen as a sine qua non for the minimal functioning of a regime. For example, in some international environmental agreements like Convention on Biodiversity, Ozone Depletion etc. the developed countries have specific interests that push them to provide more favorable treatment to the developing countries. This can be seen from the incorporation of S&D provisions like “common but differentiated treatment”, technology transfer, and financial incentives (GEF).

A survey conducted in 1983 concluded that between the ten-year period 1969-79, the UN General Assembly alone has adopted 826 provisions, incorporated in 135 resolutions, calling for preferential treatment for developing countries. Such differential measures spanned the following 12 major areas of economic cooperation:

- trade;
- invisibles;
- balance of payments financing;
- financial transfer for development;
- material aid; technical assistance;
- debt problem solution; transfer of technology and science;
- economic and technical cooperation among developing countries;
- exploitation of the common heritage of mankind;
- environmental protection; and
- equitable participation for developing countries in the decision-making process with respect to economic and monetary matters.

The S&D treatment provision contained in international treaties fall under two broad categories: firstly, exceptions to the overall rules that apply to developed countries in the system; and, secondly, positive actions in favour of developing countries that are required by developed countries or by the institutional mechanism under the relevant

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9 Law of the Sea.

10 Some of the international treaties which provides special treatment for less-developed countries are: the International Tropical Timber Agreement, 1994 (33 ILM 1994 1014), which provides similar number of votes to the group of consumer and to the group of producer member states and, further it allocates votes among the producers countries partly according to their respective shares of the total tropical forest resources; The Framework Convention on Climate Change provides special treatment for low-lying coastal areas and small island countries; the Berne Convention for the Protection of Literary and Artistic Work (1896), where the developing countries have the right to provides for a regime of non-exclusive, non-assignable compulsory licenses to translate and/or reproduce works protected by the Convention, for systematic instructional activities. Appendix, (Paris Act, 1971).

11 Wil D. Verwey, “The Principle of Preferential Treatment for Developing Countries”, vol.23, Indian Journal of International Law, 1983, p. 344. The impact of this surge was also felt in GATT with the enactment of “Enabling Clause” in 1979, which gave a permanent legal basis for S&D treatment in international trade law.
treaty. Further, depending on the nature of the concessions provided for in the treaty, the S&D treatment provisions take the form of (i) provisions for permitting weaker countries to assume lesser obligation in international legal regimes; (ii) provisions relating to transitional period to comply with certain obligation; (iii) provision for technical and financial assistance; (iv) provision for transfer of resources or technology; (v) assistance for strengthening the legal and/or institutional mechanism of the weaker state; (vi) greater access to the domestic markets of developed countries for the products of weaker countries; (vii) special provisions to safeguard the interest of weaker countries in international agreements.

Apart from enhancing substantive equality, the concept of S&D treatment fosters less confrontational relations among States. Further, S&D treatment provides the States incentive for better and more effective implementation of their obligations in international instruments.

It may be noted that as the benefits of differential treatment is always treaty-based, the concept of “special and differential treatment” is generic, its content and application is regime-specific, and so a definition covering all aspect of the regime is impracticable.
III. EVOLUTION OF THE CONCEPT IN THE GATT

A. INTRODUCTION

The concept of special and differential treatment in international trade law evolved out of the coordinated efforts of developing countries seeking to correct the perceived inequalities of the post-war international trading system by introducing preferential treatment in their favour across the spectrum of international economic relations.\textsuperscript{12} The movement started in the 1947-48 Havana Conference when the developing countries, especially from Latin America, challenged the assumptions that trade liberalization on a most-favoured-nation (mfn) basis would automatically lead to economic growth and development. Further momentum was generated when the newly independent countries of Asia and Africa supported this argument, stating that the peculiar condition of their economies caused by historical trading relationships constrains their trade prospects. Broadly speaking, developing countries sought international understanding and support for their need to overcome their colonial legacy and achieve their developmental objectives.

Developing countries tended to specialize in raw materials and primary commodity exports (which were affected by low prices and price volatility), while they were dependent on imports for manufactures, especially for capital goods needed for industrialization. Therefore, the liberal trade policies advocated by the GATT framework were seen as a negative influence over the development of infant industries, as well as, constraining the ability of developing countries resort to short term trade control measures to redress balance of payment difficulties. The trade strategy practiced by most developing countries at the time emphasized three main stands:

- The promotion of industrialization through import substitution behind protection tariff and non-tariff barriers;
- The promotion of exports of manufactures aimed at diversifying the export structure (through export subsidies);
- The use of trade control in response to actual or potential balance-of-payment difficulties.\textsuperscript{13}

As a result of these trade strategies, developing countries demand for changes in the multilateral trading system were centered on the following four main areas:


\textsuperscript{13} Constantine Michalopoulos, “Trade and Development in the GATT and WTO: The Role of Special and Differential Treatment for Developing Countries”, p. 3-4
(i) improve market access for developing country exports of manufacturers to developed markets, through the provision of trade preferences, in order to overcome the inherent disadvantages developing countries were facing in breaking into these markets;

(ii) non-reciprocity, or less than full reciprocity, in trade relations between developing countries and developed countries, in order to permit developing countries to maintain protection that was deemed necessary to promote development;

(iii) flexibility in the application by developing country members of GATT, and later WTO, disciplines, for the same reason; and

(iv) stabilisation of world commodity markets. 14

However, it takes decades for the evolution of the “special and differential treatment” approach towards developing countries within the GATT regime.

B. THE GATT 1947

Essentially comprising a facility to negotiate reciprocal tariff cuts, GATT was not ready to respond to developing countries needs for a comprehensive trade agenda or to grant special status and differential treatment. When the GATT was concluded in 1947, there was no special provision, which reflected the concerns of the developing countries. 15 In spite of the fact that 11 of the 23 original signatories would have been considered as developing country, 16 there was no provisions or exceptions in the GATT that protected the developing country interests. 17 The rights and obligations under the GATT agreements were applied on a uniform basis, notwithstanding their unequal economic standing. 18 The underlying rational for this position could be discerned from the prevailing economic ideology of that period. It was the view of the signatory States that all countries, which acceded to GATT, could gain from the multilateral trading system, if they identified and exploited their strengths. The idea of giving preferences to a certain group of countries was not viewed favourably at that time, as it was likely to distort trade and reward inefficient producers. Increasing global welfare necessitated a rule based, non-discriminatory system guaranteeing a level playing-field for conducting international trade.

14 Ibid. p. 4.
15 On 30 October 1947, they signed a Final Act establishing the text of the agreement and a ‘Protocol of Provisional Application’ putting the GATT agreement into force “provisionally”.
16 At that point of time there was no procedure to identify “developing country”. It was largely a matter of self-selection like it is now in the WTO as well, though the IMF plays a decisive role in identifying a country with developing status. As regards Least Developed Countries (LDC Members), it is the United Nations, which identifies a LDC, and has identified 48 countries as LDC Members till date.
17 The term “special and differential treatment” (or special and more favorable treatment) for the first time came to be used in the 1973 Tokyo Round Declaration, which recognized “the importance of the application of differential measures in developing countries in ways which will provide special and more favorable treatment for them in areas of negotiation where this is feasible”.
The idea of relaxing normal GATT rules and granting special and differential treatment gained prominence after the accession of a number of newly independent developing countries to the GATT in the 1950’s. While recognising that sustainable increase in income could only be brought about by industrialization, most of these countries challenged the basis assumption of the GATT system, arguing that it was not realistic to expect newly independent countries with fragile economies to compete on equal terms with industrial countries.

The need for additional flexibility with regard to GATT obligations for developing countries was recognised at the Review Session (1954-55) when Article XVIII was revised. Article XVIII title “Governmental Assistance to Economic Development” is a lengthy provision containing 23 paragraph. For the present purpose, it suffices to note that the revision to this article achieved the following:

- as regards Article XVIII: B, the structured nature of balance-of-payments (BOP) problem was recognised, and the obligation of developing countries maintaining BOP restrictions to hold annual consultations was reduced to once in two years;
- as regards Article XVIII: C, the requirement of prior approval for measures deviating from GATT obligations for the promotion of a particular industry, was relaxed.

These amendments thus introduced, for the first time, the concept of differential treatment of developing countries.

Other developments of interest to the developing countries were the adoption of the ‘Declaration Giving Effect to the Provision of Article XVI:4 of GATT’ by the Contracting Parties in November 1960, which exempted developing countries from the prohibition on export subsidies for manufactured products. The GATT Contracting Parties in December 1961 adopted the ‘Declaration of the Promotion of Trade of Less-Developed Countries’. ¹⁹ This Declaration covered tariff reduction and obstacles to trade in agricultural products and called for action in seven areas. ²⁰ Of particular interest in the Declaration is the call for preference in market access for developing countries. This was the first mention in the GATT of what would later on become the Generalised System of Preferences (GSP) for developing countries.

Though the revision of GATT Article XVIII and other Declarations (most of them non-mandatory obligations) enabled developing countries to adopt measures (for e.g. high tariff) to discourage imports and thereby encourage the growth of domestic industries with minimal competition, they did not grant them preferential access in the markets of their trading partners. A sense of despondency over the perceived limited scope of GATT to address their trade concerns, stirred developing countries to

¹⁹ Decision of 7 November 1961.
²⁰ The areas included were: removal of quantitative restrictions; tariff reduction; elimination of tariffs on primary commodities; removal or considerable reduction of fiscal duties in developed countries, improved access for purchases made by State agencies; preferences in market access; limitation of subsidies. Development Division, WTO, “Developing Countries and the Multilateral Trading System: Past and Present”, High Level Symposium on Trade and Development, Geneva, 17-18 March 1999, p. 12.
successfully lobby towards the establishment of the United Nations Conference on Trade and Development (UNCTAD) in 1964 to deal explicitly with problems of trade and development. In effect, the process and procedure from the developing countries, were largely responsible for the adoption of Part IV of the GATT, which was entitled “Trade and Development”.

C. PART IV OF GATT 1947

The 1963 GATT Ministerial Meeting recognized the need for an “adequate legal and institutional framework to enable the CONTRACTING PARTIES to discharge their responsibilities in connection with the work of expanding the trade of less-developed countries” and mandated the amendment of the General Agreement to introduce a Part IV. Accordingly, in 1965, the GATT adopted a specific legal framework to address this issue, by introducing Part IV. Part IV titled “Trade and Development” added three new provisions to the GATT – Articles XXXVI, XXXVII and XXXVIII.

Part IV was quite significant for it codified in the multilateral trading system the concept of ‘non-reciprocity’ in trade negotiations between developed and developing countries. Accordingly, developed countries gave up their right to ask developing countries to offer concessions during trade negotiations to reduce or remove tariffs and other barriers to trade.

In addition, Part IV recognised the need for a rapid and sustained expansion of the export earnings of the less-developed countries. These include, according high priority to the reduction/discrimination of barriers to products currently or potentially of particular interest to the developing countries, including customs duties and other restriction which differentiate unreasonably between such products in their primary and in their processed forms.

Subsequent to the incorporation of Part IV into the GATT Agreement, a Committee on Trade and Development (CTD) was established to keep under continuous review the application of the provisions of Part IV. The terms of reference for the Committee also included formulating proposals relating to furtherance of the provisions of Part IV and consideration of the question on the eligibility of a contracting party to be considered as a less-developed contracting party.

In the period between 1966 and 1973, there took place a number of developments of interest to developing countries. The CONTRACTING PARTIES in 1966, adopted special procedure for disputes brought by developing countries against developed countries. These procedures introduced two new elements: mediation by the Director-General of GATT to resolve a dispute after consultation failed and time limit for various stages of the dispute settlement procedure. Commenting on these earlier efforts one writer observed:

“A pattern appears to have evolved during these early years: the CP of GATT accommodated developing countries desires not to liberalise their import regimes partly on infant industry grounds, partly for balance of payments reason; but
regarding questions of improved access to developed country markets as well as commodity price stabilization, the GATT refrained from taking action or make legally binding commitments. For example, none of the provisions of Part IV legally bound the developing countries to undertake specific actions in favour of developing country CP. And the Trade and Development Committee was then, and still is, primarily a forum to discuss developing country issues but not to negotiate legal commitments in their favour. During this period, many developing countries were not CP of the GATT, and those that were participated minimally in its deliberations.21

D. GENERALIZED SYSTEM OF PREFERENCES (GSP)

In the year 1968, the United Nations Conference on Trade and Development (UNCTAD), for the first time proposed the Generalized System of Preferences (GSP).22 Under the GSP, the developing countries are given preferential treatment (like reduced or zero tariff) by developed countries to products originating in developing countries. The GATT contracting parties in 25 June 1971 adopted the GSP scheme.23 The system was established on a voluntary basis by the developed countries – implying thereby that they were not legally bound under the GATT to maintain it.

The GATT Contracting Parties could not agree that Part IV gave general permission for the introduction of such preferences. Therefore a GATT waiver from MFN obligations was granted in 1971, initially for a period of 10 years along with another waiver allowing developing country contracting parties to grant preferences among themselves. Preference giving countries also clarified that the legal status of the of the tariff preferences to be beneficiary countries will be governed by the following considerations: (a) the tariff preference are temporary in nature; (b) their grant does not constitute a binding commitment and it does not in any way prevent their subsequent withdrawal in whole or part or the subsequent reduction of tariffs on a mfn basis, whether unilaterally or following international tariff negotiation.24 In practice, GSP schemes were administered by the preference-giving contracting parties (developed countries) on a unilateral, voluntary and discriminatory basis. They could amend, modify or withdraw benefits unilaterally and at any time. Thus, in contrast to the term “Generalized” System of Preference (GSP), the schemes were neither generalized nor on a non-discriminatory basis.

22 The UNCTAD Trade and Development Board unanimously accepted the idea of the GSP as formulated in UNCTAD Res. 21(II) in 1970 and was agreed upon to incorporate in the GA Resolution on the Second UN Development Decade. Wil D. Verwey, “The Principle of Preferential Treatment for Developing Countries”, vol.23 Indian Journal of International Law, 1983, p. 395.
23 Generalized System of Preferences – Decision of 25 June 1971 – (L/3630). 27 industrialized countries adopted GSP programs in the 1970’s, each of which varies according to the beneficiaries, products covered, and type of preference granted. The GATT Contracting Parties granted three waivers from Art. I of GATT, the first was the authorization given to Australia to offer tariff preference to developing countries on a specific list of products; the second was the permission granted to all developed countries to maintain Generalized System of Preferences (GSP) schemes in favour of developing countries; the third was the permission granted pursuant to the ‘Protocol of Trade Negotiations among Developing Countries’, for sixteen countries to exchange trade concessions among themselves.
24 Ibid.
E. THE TOKYO ROUND AND THE ENABLING CLAUSE

The Ministerial Declaration (Tokyo Declaration) that led to the Tokyo Round (1973) recognized that the objectives of multilateral negotiations to secure benefits for the international trade of developing countries and acknowledged the “importance of the application of differential measures to developing countries in ways which will provide special and more favourable treatment for them in areas of the negotiations where this is feasible and appropriate”.

A major part of the Tokyo Round negotiations dealt with codes for dealing with non-tariff measures – namely antidumping, subsidies and countervailing measures, customs valuation, government procurement and import licensing. Each code provides for some form of S&D treatment for developing countries. While some of these provisions were vague or aspirational in nature, other provisions granted substantive exemptions from commitments for developing countries for commitments for developing countries. As the Tokyo Round Codes were optional, only a few developing countries acceded to them, despite the inclusion of some S&D treatment provisions.

One of the major decisions that emerged from the Tokyo Round was the Decision of 29 November 1979 on ‘Differential and more Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries Clause’ (widely referred to as the “Enabling Clause”). The Enabling Clause established the principle of differential and more favourable treatment, reciprocity and fuller participation of developing countries. The main objective behind the inclusion of Enabling Clause was to increase commercial opportunities of developing country Members by making the provisions of Article I of GATT more flexible, through preferential treatment accorded by developed countries to products originating from developing countries. It provided a permanent legal basis in the GATT legal system for:

- preferential market access for developing countries to developed countries market on a non-reciprocal, non-discriminatory basis;
- more favourable treatment for developing countries in other GATT rules dealing with non-tariff barriers;
- tariff and, subject to the approval of the CONTRACTING PARTIES, non-tariff preferences among developing countries, in the framework of regional or global trade arrangements; and
- deeper preferences, in the context of GSP schemes, for least-developed countries.27

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25 Article 13 of the Anti-Dumping Code for example, asked developed countries to consider more constructive remedies than the imposition of antidumping duties on exports from developing countries.
26 For example, the provision in the Subsidies Code that exempted developing countries from the obligation to prohibit exports subsidies on non-primary products.
27 Edwini Kessie, Enforcement of the Legal provisions Relating to Special and Differential Treatment under the WTO Agreements, p. 5.
In other words, the Enabling Clause transformed the 10-year waiver for GSP into permanent waivers.

With a view to meet the concerns of primary commodity producing countries, the Common Fund for Commodities (CFC) was established under the auspices of UNCTAD in 1980. The Fund has two objectives pursued by its two Accounts. The First one is designed to finance international buffer stocks, while the second Account is to be used to finance measures for commodity development, as well as to promote coordination and consultation on commodity issues.

As a counterweight to the provisions for special and differential treatment, the Contracting Parties agreed to the principle of “graduation”. This principle embodies the expectation that the capacity of developing countries to undertake equal rights and obligations under the GATT Agreement, along with other developed countries, would increase with the improvement over time of their economic status and trade situation. This provided the formal basis for preference-giving, developed countries to phase out preferential market access to Contracting Parties which were deemed to have attained a sufficient level of progress. The countries, which have been considered as “graduated” by US are: the four main Asian Newly Industrialized Economies (Hong Kong, Korea, Singapore and Taiwan) in 1989 and Malaysia in 1997; Mexico lost GSP when the NAFTA entered in to effect in 1994. Other countries have seen their benefits reduced, suspended, or terminated as a result of disputes over workers rights and other matters. 28

An overall assessment of the developments during 1950-80 reveals significant achievements for developing countries. Within the GATT framework, developing countries had obtained ample flexibility for infant industry protection; in multilateral trade negotiations, they were not expected to offer reciprocal liberalisation commitments; they could support their exports through subsidies; and developing country exports had preferential access to developed country markets under the GSP.

F. TRANSITION FROM THE GATT TO THE WTO

While the need for special and differential treatment for developing countries continued to be espoused during the 1980’s, a silent but perceptible change in the thinking of developing countries over trade and development issues was emerging. This transformation stemmed from the cumulative effect of a host of factors.

(a) Though considerable reductions in tariffs were achieved, non-tariff barriers continued to exist, and more so, continued to increase on products of interest to developing countries. This was especially true regarding textiles and clothing (under the Multi-fibre Agreement) – a multi-fibre framework adopted outside the purview of GATT. This coupled with bilaterally agreed “voluntary export restraints” (VERs) or orderly marketing arrangements (OMAs) imposed by developed countries, left the developing countries vulnerable.

(b) The agriculture sector too remained essentially outside the GATT. This permitted developed country exporters to restrict imports and subsidize exports on a number of products which were of export interest to developing countries.

(c) Notwithstanding the reduction of tariffs, tariff escalation was substantial. This effectively impeded the entry of developing countries into the processed goods markets concomitantly affecting their industrialization efforts.

(d) The initial euphoria over the GSP subsided soon when developing countries ran into practical difficulties of the sort mentioned below. On the other hand, developing countries had to face the challenge of new non-tariff measures introduced by developed countries for achieving protectionist ends, often disguised as concern for otherwise legitimate objectives – consumer health and safety or pursuing environmental goals.

- The GSP, being a voluntary scheme, meant that developing country suppliers had less certainty regarding market conditions in developed countries. In addition, the GSP was beginning to be applied in a conditional and discriminatory fashion, being used more frequently by some preference-giving countries as a means of leverage to obtain other subjects, including measures outside the area of trade.
- GSP programs fail to cover some products in which developing countries have the greatest comparative advantage, such as textiles.
- The complexity of the system (especially its rule of origin paperwork) and technical incapacity of developing country exporters inhibit full use of GSP preferences;
- Even where meaningful benefits accrued from GSP, they seemed to be concentrated on the more advanced developing countries which needed them the least;
- Recourse by developed countries to the concept of “graduating” higher income developing countries from GSP increased the relative importance of reciprocal liberalization with “bound” concessions;

(e) At the same time, serious rethinking of the trade policies appropriate for development was taking place in many developing countries. The experience of the 1960’s and 1970’s suggested that countries pursuing more “open” trade policies experienced strong growth in exports and per capita income. In contrast, the slow growth or decline in per capita income associated with developing countries pursuing policies of import substitution and infant industry protection raised doubts over the effectiveness of such policies. Hence, starting with the 1980’s a large number of developing countries

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29 Tariff escalation: If a country wants to protect its processing or manufacturing industry, it can set higher tariffs on imported materials used by the industry (cutting the industry’s cost) and set higher tariffs on finished products to protect the goods produced by the industry. This is “tariff escalation”. When importing countries escalate their tariffs in this way, they make it more difficult for countries producing raw materials to process and manufacture value-added products for exports. Tariffs escalation exists in both developed and developing countries. Slowly, it is being reduced.
opted for more open trade regimes and undertook autonomous trade liberalization in the belief that such regimes were conducive to the attainment of development objectives.

(f) The scepticism of developing countries towards import substitution policies and preferential arrangements coincided with the emerging recognition of the value of their active participation in the multilateral trade negotiations. Developing countries by not participating in the exchange of reciprocal reduction in trade barriers missed the opportunity of gaining reduction in trade barriers on products of specific export interest to them. Thus, with the raising importance of reciprocal liberalization as a means of attaining greater market access, the importance of GATT as an institution within which developing countries wanted to pursue trade objectives started to rise.

Thus at the beginning of the 1980’s, developing countries began to perceive that the positive discrimination received under S&D treatment had been outweighed by increasing negative discrimination against their trade. Commentary on the prevailing situation, one writer notes:

“Unlike in the earlier period, whom developing countries were mainly concerned with securing improved access to the markets in the North, they now had to face the additional task of having to liberalize and open up their own economies and thus to cope with powerful and often global economic actors from the North. In facing this dual challenge, the developing countries all too often had adequate means neither to penetrate Northern markets, nor to protect their won national space and economies.”

The profound changes in the global geopolitical situation accompanied by the shift towards neo-liberalism in the north; the expanding trade agenda of developed countries; a weakening of collective action by the south; and the erosion of the UN’s role in the economic sphere – all these collectively shifted the focus to GATT and eventually to its institutional incarnation after the Uruguay Round was concluded, namely WTO.

G. THE URUGUAY ROUND DEVELOPMENTS

By the time the Uruguay Round was launched, developing countries were contemplating giving reciprocal concession to their trading partners. They reasoned that if special and differential treatment had failed to reverse their marginalization, then it was about time to consider to reverse narrowing its scope by limiting the application of the non-reciprocity principle and giving reciprocal concessions, so as to advance their trading interests.

Unlike the Tokyo Round, in the Uruguay Round, developing countries become active in all areas of consideration. They were determined not to entrust the important function of rule making to their trading partners. The Uruguay Round was hence seen by developing countries as a means of obtaining improved, secure market access for their

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exports; consolidating the liberalization undertaken unilaterally and obtaining “negotiating credit” for countries benefiting from their unilateral liberalization.  

While special and differential treatment was far from abandoned as a principle in the Uruguay Round, the developing country negotiating approach evolved to be one of pushing what was there earlier, rather than pushing for further enhancement. Priority was placed on other negotiating areas, including textiles, agriculture, and dispute settlement. To sum up, either out of conviction or because of fears of closing markets, developing countries abandoned their former defensiveness and embraced a much more participatory attitude.

Developing countries, however, learned soon in the early stages of the Uruguay Round that greater participation did not translate automatically into leverage, as they found it difficult to decisively influence the process of agenda setting and to shape the final outcome of the negotiations. So also, with the expansion of the agenda through the inclusion of complex and slippery issues (Services, Intellectual property, technical barriers, sanitary and phytosanitary standards), the capacity of many developing countries for analysis and for turning such analysis into sound negotiating positions was overtaxed.

However, developing countries did not leave the negotiations empty-handed: the inclusion of agriculture; the commitment to phase-out the restrictions on textiles; and the creation of a strong, rule-based dispute settlement mechanism can be deemed important gains. Notwithstanding a few significant ones, these gains were offset by: a more restrictive approach towards special and differential treatment; commitments made in the intellectual property and services agreements; the binding of many developing country tariffs; and new disciplines on subsidies and customs valuation. Overall, the result of Uruguay Round reflects the balance of power and capabilities prevailing during negotiations.

The adoption of the “single undertaking” as the guiding principle for the Uruguay Round had a fundamental impact on the rights and obligations of developing countries, including “special and differential” treatment. Acceptance of this principle meant that all members, developed and developing, would be subject to the same set of rules.

Thus, many post-Uruguay Round S&D treatment provisions are expressed in terms of transition periods and differences in threshold levels. That is, the WTO Agreements specify how soon and to what extent industrial and developing countries should meet their obligations. The setting of such transition period and threshold levels appears haphazard and ad hoc and are often subject to the criticism that they are not closely linked to objective criteria reflecting differences in levels of development or a country’s institutional and human capacity.

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At a more general level, the value of the WTO’s S&D provisions in terms of incorporating the developmental dimensions have seen doubted. As one writer points out, S&D treatment has evolved from being a development tool (until the Uruguay Round) to being an adjustment tool (in the WTO legal framework):

“Until the Uruguay Round, when the trade agenda was confined to trade in goods, S&D was conceived as a development tool in particular by allowing flexibility in the use of tariffs and quotes in case of balance of payments crisis affecting the local industries, and by helping developing countries exports to compensate their difficulties in acceding to international markets.

Since the Uruguay Round, the trade agenda has extended beyond the border measures for trade in goods: it includes other forms of trade and targets “within-the – borders” policies that affect trade and imply the deep integration of economies (services, domestic support and export competition, trade remedies such as anti-dumping and countervailing duties, IPRs, investment policies, etc.).

The overarching idea of the Uruguay Round S&D provisions applied to “within-the-borders” trade agenda is to provide adjustment tools to the developing countries, in order to modify their laws and economic policies to comply with the new trade rules – taking for granted that these rules will automatically be beneficial for their development.”

Against this backdrop, it is not surprising that difficulties over the scope and application of S&D provisions have continued to be raised at the Ministerial Meetings of the WTO.

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IV. SPECIAL AND DIFFERENTIAL TREATMENT IN THE WTO

A. INTRODUCTION

The conclusion of the Uruguay Round negotiations, provides a framework agreement and code of conduct in international trade, setting out the basic rights and obligations for the policies of its Members. The WTO Agreement provides for a ‘single undertaking approach’ which aims “to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade (GATT 1994), the results of past trade liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations.”

The WTO intents to provide a common institutional framework for the conduct of trade relations among its Members, and facilitates the implementation, administration and operation of all covered agreements. It has at present 146 Members; more than two-third of them are developing and least-developed (LDC Members).

Indeed, the foundation of the WTO rests on the principle of non-discrimination among Members. The two important aspect of the principle of non-discrimination in WTO is the principle of ‘most-favoured-nation treatment’ (MFN) and the ‘national treatment’. The non-discrimination principle implies that no Member/Members shall be given a favourable treatment within the WTO legal framework. The WTO Agreements, however, recognizing the de facto inequality that exists among its Members and has provided for special provisions, which positively discriminate in favour of the developing and least-developed country Members. This special and more favourable treatment provisions form an exception to the general rule of most-favoured-nation (MFN) and national treatment.

B. PROVISIONS IN THE WTO AGREEMENTS

The special and differential treatment as a principle has long been recognized in the GATT and the WTO legal system. This principle is an ‘established right’ under the WTO, which recognizes that the “developed country Members and the WTO as an

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34 Preamble, Marrakesh Agreement Establishing the World Trade Organization, 1995 (Marrakesh Agreement); by this the WTO Agreement integrates the 30 Uruguay Round Agreements (including GATS, TRIMs, and TRIPS) and about 200 previous GATT Agreements onto one single legal framework.


36 This principle prohibits the granting of any benefit, favor, privilege or immunity affecting custom duties, charges, rules and procedures to a particular country or group of countries, unless they are made available to all like products originating in all other Members of the WTO.

37 According to this principle, the WTO Members are prohibited, under certain conditions from discriminating between imported products and domestic products.

38 In WTO there is no definition of “developing” countries. It is to a certain degree a matter of self-selection and other member countries can be challenged this decision. The important consequence of having a developing countries status in the WTO is that brings certain rights, which are not available to other members. However, self-selection does not automatically mean that it will benefit from the unilateral preference schemes of some developed countries such as the GSP. In the case of “least-developed countries”, the WTO follows the UN list. <www.wto.org>

39 Proposal of Paraguay, TN/CTD/W/5.
institution, by itself or in collaboration with other organizations, are to accord special and differential treatment to developing and least developed country Members in view of their development needs and resource constraints. The main objectives of the S&D treatment was to foster the ability of developing country Members to become full participants in the multilateral trading system and reap the benefit of the WTO membership. This require, apart from special domestic policies, measures and laws, direct assistance for enhanced access to global and regional markets, domestic implementation of obligations, administrative and continuous compliance with obligations, and enforcement of their rights under the agreements. Further, resource constraints in the form of human, financial, and institutional shortfalls require technical, financial and various types of assistance to supplement domestic resources and establish or strengthen domestic institutions.

Accordingly, the Marrakesh Agreement Establishing the WTO, in its preamble, recognizes the special “need for positive effort designed to ensure that developing country Members, and especially the least-developed among them, secure a share in the growth in international trade commensurate with their economic development”. Apart from the broader recognition of this principle in the WTO Agreements, there is around 145 agreement-specific S&D treatment provisions spread across the different WTO Agreements. These provisions provide for favourable treatment in market access for developing country Members products, flexibility in implementation of commitments, technical assistance, and protect the special needs of the developing Members. In addition, the General Council of the WTO also established a Committee on Trade and Development (CTD), with a view to “review periodically, … the application of special provisions in the Multilateral Trade Agreements and related Ministerial Decisions in favour of developing country Members, and in particular least-developed country Members, and report to the General Council for appropriate action” and “consider any questions which may arise with regard to either the application or the use of special provisions”.43

However, the state of implementations of these S&D provisions for the past seven years has become a deep source of concern for the developing country Members. The actual working of the S&D treatment provisions has proved that it does not adequately take into account the development realities of the developing country Members. Some of the major problems encountered by the developing country Members with respect to the implementation of S&D provisions in the post-Uruguay Round period were:

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41 The S&D treatment should target specific country’s trade, financial and developmental needs; should assist developing countries with meaningful and constructive mechanism to assist then in developing the necessary infrastructure and “know-how”; should reinforce the adoption of sound economic and governance policies and open trade policies; Beneficial to development effort are reinforced, including growth, poverty reduction and sustainable development, while those that may potentially delayed this progress are assessed and reconsidered. Proposal of Canada, TN/CTD/W/21
42 WT/GC/M/1, section 7.A(1).
43 WT/L/46
Firstly, most of the WTO provisions dealing with special and differential treatment are unenforceable, as they are expressed in imprecise and hortatory language.44

Secondly, the basis and value of GSP eroded as tariffs were reduced on a number of products of interests to developing Members, as a result of the Uruguay Round.

Thirdly, though Part IV continued in existence, its philosophical and political foundations had been weakened and its specific provisions were *de facto* challenged by a number of outcomes of the Uruguay Round.

Fourthly, the liberalization of developing Members markets in number of trade related fields not involving goods had major implications in economic and social sectors, and domestic capacity building especially due to their inability to compete in equal terms with advance economics.

Finally, while tariffs as a means of protecting national economies were considerably reduced, the developed Members started using covert non-tariff measures in an overtly legitimate way to achieve their protectionist ends. These highly sophisticated forms of protectionism place developing Members in a difficult situation, in part because they are the Members most effected one and will find it more difficult to adjust, and also because it is hard to challenge the overt intent of these measures, such as protecting the consumer health and safety (*EC-Hormone* case, DS26), pursing environmental or human rights goals.45

To remedy this state of affairs, various WTO Committees undertook the review of implementation of S&D provisions in specific agreements in the year 1998-99. However, nothing concrete was achieved. It is in the light of these developments that developing Members demanded a more systematic and in-depth review of all S&D provisions with a view to making them more precise, effective and operational. Heeding to this demand, the WTO at its fourth Ministerial Conference at Doha, mandated a thorough review of the entire S&D provision with a view to making them mandatory and operational.

C. **CATEGORIZATION OF S&D PROVISONS IN WTO AGREEMENTS**

There are 145 special and differential provisions spread across the different WTO Agreements. Of these, 107 were adopted at the conclusion of the Uruguay Round, and 22 apply specifically to least-developed Members.46 By the nature of the concessions granted to the developing and least-developed Members, these provisions can broadly be divided into six categories as follows:

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(i) provisions aimed at increasing trade opportunities;
(ii) provisions that require WTO Members to safeguard the interest of the developing country Members;
(iii) flexibility of commitments;
(iv) transitional time periods;
(v) technical assistance; and
(vi) provision relating to measures to assist least-developed country Members.

Most of these provisions have been carried forward from the pre-Uruguay round instruments, although new ones have also been added.

(i) Increasing Trade Opportunities (Market Access)

Under the WTO system, there are totally 12 agreement-specific S&D provisions aimed at increasing the trade opportunity of the developing or least-developed Members, spread in four agreements and one decision. These provisions require positive action from developed Members or by WTO and other organizations. Market access provisions are crucial for achieving the developmental goals of developing Members. These provisions recognize the importance for developing Members to diversify their exports into manufacturing and the difficulties that they may face in breaking into international market for such products, developed countries have provided tariff preferences to exporters of manufacturers from developing Members and least-developed Members under the GSP.

Though a small number of developing Members, especially from South-East Asia, have succeeded in increasing their share in world trade in the last decade, the trend is reverse in the case of most of the developing Members. A major portion of the foreign exchange earnings of developing Members continues to be from primary commodities export. The over-dependence on primary commodity export exposes the developing Members to volatility in export earnings due to the volatility in commodity export prices and the prospect of long term deterioration in the terms of trade, which imposes higher economic and social costs. Thus, it is crucial that the current S&D provisions in the WTO Agreements are effectively implemented and S&D treatment be developed in future in a manner that would sufficiently take into account the particular needs of the developing Members.

Some of the provisions which provide favourable market access for developing country Members are: GATT 1994 (Articles XXXVI-XXXVIII); Agriculture (Preamble); Textiles and Clothing (Article 2.18); the GATS (Article IV); and the Enabling Clause (Decision of 1979).

47 GATT 1994 (Art. 36-38), Agreement on Agriculture, Agreement on Textiles and Clothing, the GATS and the Enabling Clause, 1979. WT/COMTD/W/77, p. 4.
48 In the period between 1985-96, the share of Africa in the value of world merchandise exports declined from 4.2 per cent to 2.3 percent; the share of Middle East from 5.3 to 3.2 per cent; and the share of Latin America from 5.6 per Cent to 4.9 percent.
49 www.southcentre.org
(ii) Safeguard the Interest of the Developing Country Members

There are 49 provisions spread across 13 WTO Agreements and two decisions that require WTO Members to safeguard the interest of the developing Members. These provisions require either positive action from the WTO Members or actions to be avoided, or favourable interpretation by the WTO bodies, so as to protect the interest of the developing Members.

Some of the provisions which require safeguarding the interest of developing country Members are: Part IV of GATT 1994; Application of SPS Measures (Article 10.1 and 10.4); Textiles and Clothing (Article 6.6(b), 6.6(a) and Annex, paragraph 3(a)); Technical Barriers to Trade (Article 12.4); Implementation of Article VI of GATT 1994 (Article 15); Implementation of Article VII of GATT 1994 (Annex III.5); Import Licensing Procedures (Article 1.2; Article 3.5 (a)(iv); Article 3.5(j)); Subsidies and Countervailing Measures (Articles 27.1; and 27.15); Safeguards (Article 9.1 and Footnote 2); GATS (Article XIX:3); TRIPS; the Understanding on Rules and Procedures Governing the Settlement of Disputes (Article 4.10; Article 10.8; Article 12.10; Article 12.11; Article 21.2; Article 21.7; and Article 21.8.); the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries (paragraphs 3(i) and paragraph 3 (ii); 4 and 5) and the Decision on texts relating to Decision on Texts Relating to Minimum Values and Imports by Sole Agents, Sole Distributors and Sole Concessionaires.

(iii) Flexibility of Commitments

Under the WTO, the developing Members are accorded greater flexibility in application of most of the WTO rules and procedures. The flexibility may be specific in nature, or of general nature by providing for a further extension of an initial transition period under certain conditions. Further, developing country Members may be granted ‘specific, time-limited exceptions in whole or in part’ from the obligations, provided that meeting these obligations is considered as inappropriate to their development, financial and trade needs (SPS and TBT) or to their administrative or financial capacities (customs Valuation). There are 30 such provisions across nine different WTO Agreements pertaining to flexibility of commitments for the developing Members. These provisions relate to: actions a developing country may undertake through exceptions, which otherwise apply to Members in general; exceptions from commitments otherwise applying to Members in general; or a reduced level of commitments developing Members may choose to undertake when compared to Members in general.

50 Like in the Agreement on Agriculture and Agreement on Subsidies and Countervailing Measures.
51 Like in TRIMs.
53 GATT 1994 (Art. 18 and 36), the Agreement on Agriculture, Technical Barriers to Trade, TRIMs, Subsidies and Countervailing Measures, GATS, the Understanding on Rules and Procedures Governing the Settlement of Disputes, and the Enabling Clause.
54 WT/COMTD/W/77, p. 5.
Some of the provisions which provides flexibility in action or use of policy instruments are found in GATT 1994 (Article XVIII and Article XXXVI); the Agreement on Agriculture (Article 6.2; Article 6.4; Article 9.2(b)(iv); Article 9.4; Article 12.2; Article 15.1; Public stockholding for food security purposes: Annex 2, para. 3, footnote 5; Domestic food aid: Annex 2, para. 4, footnotes 5 & 6; Annex 5, Section B); Technical Barriers to Trade (Article 12.4); Trade-Related Investment Measures (Article 4); Subsidies and Countervailing Measures (Articles 27.2 (a) and Annex VII; Article 27.4; 27.7; 27.8, 27.9; 27.10; 27.11, 27.12, and 27.13).; GATS (Article V:3; and Article XIX:2); Understanding on Rules and Procedures Governing the Settlement of Disputes (Article 3.12); and the Enabling Clause.

(iv) Transitional Time Periods

There are 18 provisions in eight agreements, which provides transitional time period.\textsuperscript{56} These provisions intents to give the developing Members time bound exceptions from implementing their commitments, which are generally applicable to all WTO Members. However, the length of the time bound exception varies considerably from agreement to agreement. The length of an initial period of transition may be 2 years in SPS and Import Licensing; 5 years in TRIMs, Customs Valuation and TRIPS; 10 years in Agreement on Agriculture and an undermined time in the case of GATS.\textsuperscript{57}

The transition time periods designed to provide developing and least-developed country Members with a period of time that is adequate to carry out institutional changes and adjustments that may be necessary for them to address their supply side and other resource constraints, to achieve a level of socio-economic development commensurate with obligations, and to attain socio-economic growth and development rates that will sustainably ensure continuous improvement in living conditions. Though the transition period available to the developing Members was utilized and some exhausted, the objective of this concession have not been achieved. It is felt that the transition period is arbitrarily set or inadequate. To attain the objective underlying the transition period, developing Members has been suggesting that the transition period should be based on objective criteria, and developing and LDC Members should have the right to extend transition periods.\textsuperscript{58}

\textsuperscript{55} Article 27.2(a) is applicable to a subset of developing countries, listed in Annex VII, and not developing countries as a whole.


\textsuperscript{57} Article III.4 (Transparency). GATS provides that each member is required to establish enquiry points within 2 years from 1995, to provide other members, upon request, legal, regulatory and administrative advice. But, such deadline will be applied with ‘appropriate flexibility’ agreed upon by individual developing country member.

\textsuperscript{58} Proposal of the African Group in the WTO, TN/CTD/W/3/Rev.2, para. 23. However, Canada and number of other countries had objected to proposals that provide automatic self-granting extensions. Proposal of Canada, TN/CTD/W/22.
**Technical Assistance**

Almost every importance WTO Agreements provides for technical assistance provisions. There are 14 such provisions across six different agreements and one Ministerial decision.\(^{59}\)

The main aim of technical assistance or capacity building provisions in the WTO Agreement is to help the developing Members to participate in the WTO process and to integrate more easily in to the mainstream of the multilateral trading system. These provisions provides for trade-related technical assistance by developed Members to developing Members, either on a bilateral basis or through the WTO or other international organizations.\(^{60}\) The WTO bodies provides technical assistance in the preparation of market access offers in goods and services negotiations; provision of data on trade flows, tariffs and non-tariff measures; technical missions to present and explain the Uruguay round results; technical missions and workshops to explain the Uruguay round results; briefing sessions in Geneva for delegations and officials; technical assistance in preparations for reviews under the Trade policy Review Mechanism (TPRM); and joint technical assistance with other international organizations.\(^{61}\) Further, the 1989 Decision on Improvement to the GATT Dispute Settlement Rules and Procedures provides for conducting special training courses and legal expertise for developing Members.\(^{62}\) The Committee on Trade and Development (CTD) review periodically the technical cooperation programme of the WTO.

Though there is positive trend in technical assistance in the WTO, the effort is still not enough to redress the difficulties and concern faced by the developing Members. This is mostly due to insufficiency in the budget allocated for technical assistance programmes, capacity of the WTO Secretariat to meet the growing demand, and non-obligatory nature of most of the technical assistance provisions in WTO Agreement. More importantly, a large part of the technical assistance activities done by WTO Secretariat comprises seminars, which may be useful only in the initial stages.\(^{63}\) Further, the WTO provisions dealing with technical assistance do not address the issue of capacity building activities in the domestic level, such as creating infrastructure and meeting expenditure involved in implementing various agreements (especially TRIPs), technical assistance in drafting legislations involving implementation of commitments in WTO agreements and creating technically skilled work force to deal with WTO matters. Moreover, there is also need to strengthen the negotiation capacity of developing Members in WTO.

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\(^{59}\) Application of SPS Measures; Technical Barriers to Trade; Implementation of Article VII of GATT 1994; GATS; TRIPS; Understanding on Rules and Procedures Governing the Settlement of Disputes; and the Decision on NFIDs.

\(^{60}\) Some examples are the joint WTO/WIPO programme for technical cooperation in the field of intellectual property issues, technical assistance in customs valuation and technical assistance in accession process. It would be pertinent to point out that there are also provisions for technical assistance to countries in transition and in some case to developed countries as well.


\(^{63}\) www.southsentre.org
(vi) **Measures to Assist Least-developed Members.**

The Preamble of the Marrakesh Agreement Establishing the WTO 1994, recognizes the “need for positive efforts designed to ensure that developing Members, and especially the least-developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development.” Apart from the broader recognition of this right, there are 22 provisions spread across seven agreements and three decisions catering to the special needs of the least-developed country Members. All these provisions, whose applicability is limited exclusively to the LDC Members, fall under one of the five categories explained above.

Further, Article IV:7 of the Marrakesh Agreement mandates the CTD to review periodically the special provisions for LDC Members and report to the General Council for appropriate action. However, the non-binding and ambiguous nature of S&D provisions, which demand positive action in terms of market access and technical assistance, makes it difficult to implement these provisions in a coherent and effective manner. The review conducted by the CTD and the Sub-Committee on LDC Members has uncovered a wide range of problems faced by LDC Members in implementing WTO obligations.

Another form adopted by the African Group to categorised the special and differential treatment provisions in the WTO Agreements may include:

1. Specific regimes or provisions for the right of developing country governments to assist their domestic industries, such as Article XVIII of GATT 1994;

2. Fast track and flexible regimes or procedures in enforcement of the rights of or against developing Members and in requirements on developing Members, such as the Decisions referred to in the DSU for procedures where developing and least developed Members are involved in the disputes, or the special procedures under the Subsidies and Antidumping Agreements;

3. Waiver for collective efforts among developing Members to accord preferential treatment to one another; usually done in the context of broad programmes for economic cooperation and economic development;

4. Provision for special measures by developed Members to provide preferential market access for products from developing Members. Part IV of GATT 1994 and the Enabling Clause place emphasis on access to developed country markets for products of export interest to developing Members under provisions that could be made more binding;

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64 They are found in the Agreement on Agriculture; Textiles and Clothing; Technical Barriers to Trade; Trade-Related Investment Measures; GATS; TRIPS; Understanding on Rules and Procedures Governing the Settlement of Disputes; the Enabling Clause; the Decision on Measures in Favour of Least-Developed Countries; and the Waiver for preferential market access for LDC Members.
5. Inclusion in the objectives and principles of the agreements in terms of targets to be achieved. Article IV of GATS envisages that developing Members need to have an equitable share in services trade and developed Members should assist them to take up available opportunities. Generally, the principles of the WTO as stated in the preamble to the WTO Agreement include the recognition of the need for positive efforts to ensure that developing and least-developed Members secure a share in the growth of international trade commensurate with their development needs;

6. Inclusion in the agreements of provisions requiring developing and least-developed Members to undertake only such commitments or obligations as are consistent with their development needs and within their means, such as Part IV of GATT 1994 and the Decision on Measures in Favour of Least-Developed Members;

7. Provisions for technical assistance to developing and least-developed Members;

8. Provisions for transition periods for developing and least-developed Members;

9. Binding obligations to address important needs. Article 66.2 of the TRIPS Agreement provides for technology transfer to least-developed Members in mandatory terms or under binding provisions.65

V. MAKING THE SPECIAL AND DIFFERENTIAL TREATMENT MORE PRECISE, EFFECTIVE AND OPERATIONAL: THE DOHA MANDATE

A. THE DOHA MANDATE

The WTO held its fourth Ministerial Conference at Doha, Qatar, on 9-14 November 2001. The Ministers, while reaffirming S&D treatment as an integral part of the WTO Agreements agreed 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.66

Further, the Doha Ministerial Conference in its Decision on Implementation-Related Issues and Concerns provided the work programme for the effective implementation of the special and differential treatment provisions. Paragraph 12.1 of the Decision mandated the Committee on Trade and Development (CTD):

(i) to identify those special and differential treatment provisions that are already mandatory in nature and those that are non-binding in character, to consider the legal and practical implications for developed and developing Members of converting special and differential treatment measures into mandatory provisions, to identify those that Members consider should be made mandatory, and to report to the General Council with clear recommendations for a decision by July 2002;

(ii) to examine additional ways in which special and differential treatment provisions can be made more effective, to consider ways, including improved information flows, in which developing countries, in particular the least-developed countries, may be assisted to make best use of special and differential treatment provisions, and to report to the General Council with clear recommendations for a decision by July 2002; and

(iii) to consider, in the context of the work programme adopted at the Fourth Session of the Ministerial Conference, how special and differential treatment may be incorporated into the architecture of WTO rules.67

Accordingly, the Trade Negotiation Committee (TNC) at its meeting held from 28th January – 1 February 2002, decided that “…the review of all special and differential treatment provisions with a view to strengthening them and making them more precise, effective and operational … shall be carried out by the Committee of Trade and Development in Special Sessions”.

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66 Paragraph 44, Doha Ministerial Declaration, WT/MIN(01)/DEC/W/1.
67 WT/MIN(01)/W/10, p.8.
B. THE WORKING OF THE SPECIAL SESSION OF COMMITTEE ON TRADE AND DEVELOPMENT

The Special Session of the CTD convened its first meeting on 5 March 2002. By the end of July 2002, more than 80 proposals were submitted to the Special Session on different aspects of S&D treatment. The proposals submitted by the Members raised a number of systemic and institutional cross-cutting issues. These include issues relating to the principles and objectives of S&D treatment, including the utility of a clearer definition and understanding on these principles; a single or multi-tiered structure of rights and obligations; coherence; benchmarking; technical assistance and capacity building; transition periods; trade preferences; utilisation; and universal or differentiated treatment, including graduation. Apart from this, institutional issues like the Monitoring Mechanism; Annual Special Session of the General Council on LDC Members participation; Facility under the Doha Development Agenda Trust Fund; proposals on technical assistance and training etc., were also raised. Further, a number of proposals were submitted on specific provisions of the Agreements, Understandings and Decisions.

However, because of the large number of proposals, the complexity and potential implications of some of the proposals, the need to examine individually the legal and practical implications, wide differences apparent between the responses provided to many proposals, shortage of time, the difference among the Members regarding the forum for dealing with agreement-specific proposals, difference of opinion regarding the scope of the Doha mandate etc., prevented the Special Session from being able to engage in more than a preliminary consideration of many of the proposals. The Special Session of CTD was able to agree on only one issue, i.e., the proposal on Monitoring Mechanism.

This forced the General Council to extend the deadline, and instruct the Special Session to “proceed expeditiously to fulfil its mandate, … and report to the General Council with clear recommendations for decision by 31 December 2002.” “The way forward” on the future course of work, formulated by the Special Session of the CTD,

69 There is a difference among the Member countries regarding the forum that is best suited for dealing with agreement-specific issues. While some Member, especially developing country, feel that review of all the S&D provisions including the agreement-specific issues should be dealt within the Special Session of the CTD (African Group, LDC), others, especially developed countries, feel that agreement specific issue should fall under the responsibility of specific committees. According to them S&D treatment proposals for which negotiating groups exist should, however, be examined in the first place in those groups, and duplication in any case avoided. See generally Proposal of Canada (TN/CTD/W/21), EC, US, etc.
70 Some of the proposal are viewed by some Member countries as affecting the existing balance of rights and obligations and/or went beyond the Doha mandate. While other Members maintained the view that the mandate given by Ministers envisages the possibility of making changes to provisions. Report to the General Council, 26 July 2002, TN/CTD/W/25, para. 8.
71 In the General Council meeting held on 31 July 2002, the WTO Member countries officially agreed to extend the review of special and differential treatment for developing countries until 31 December 2002, TN/CTD/3.
72 According to “the way forward” the Special Session was instructed to analyse and examine the various Agreement-specific proposals and issues that have been raised in the written submissions and the discussions, and to do so:
(a) on the basis of a possible ordering of these proposals for consideration in appropriate clusters;
(b) utilizing, as appropriate, the expertise available in other WTO bodies and negotiating groups, and facilitating this through requesting and receiving reports from these bodies, and where feasible, through the holding of back-to-back meetings of the Special Session with the meetings of these bodies and groups.
was considered and approved by the General Council. Accordingly, the Agreement-specific proposals were considered in two ways. Firstly, proposals relating to certain Agreements were considered in meetings held as close as possible to the meetings of the respective WTO bodies. This was done in order to utilize the expertise of these bodies. The remaining Agreement-specific proposals were considered in thematic clusters namely (1) provisions aimed at increasing trade opportunities; (2) provisions that require WTO Members to safeguard the interest of the developing country Members; (3) flexibility of commitments; (4) transitional time periods; (5) technical assistance; (6) provisions relating to measures to assist LDC Members other than those already included in clusters 1-5; and (7) Proposals on provisions not included in the previous 6 clusters.73

C. POSITIONS OF MEMBERS ON SPECIAL AND DIFFERENTIAL TREATMENT IN GENERAL

Interestingly, the post-Doha phase witnessed a proactive approach on the part of developing Members, at least as regards the issue of special and differential treatment. The joint proposal submitted by the African Group in the WTO, stands out and could be recognized for its comprehensive sweep of the range of issues dealt with and also its coherent articulation of the special interests of this group.

The LDC Members, in order to improve the general framework of the S&D provisions in the WTO Agreements, have identified several elements that is necessary to strengthen and enhance the role of S&D treatment for the developing and least-developed country Members. According to them, the ongoing negotiation should aim at:

- re-affirmation and operationalisation of development as a primary goal of the multilateral trading system;
- strengthening and operationalising, or even the introduction, as the case may be, of the general development principles within the agreements in the four major areas of WTO, i.e. goods, services, intellectual property and dispute settlement;
- the need of developing countries to have recourse to financial resources in order to enable developing countries to undertake their obligations and enjoy their rights, including their rights under S&D treatment.
- the need to address supply side constraints in developing country Member and their need to retain the flexibility of being able to adopt pro-development policies and options.74

The African Group’s proposals identify the following difficulties common to many of the WTO Agreements and suggests certain proposals:

74 TN/CTD/W/4, see also TN/CTD/W/3R2
(a) **Ambiguity of Obligations**

Appeals to developed Members in WTO Agreements to accord special and differential treatment to developing and least-developed country Members have remained largely unimplemented. Particular reference in this instance are: Part IV of GATT 1994; the Enabling Clause: Article IV of GATS; and the Decision on Measures in Favour of Least-Developed Countries.

(b) **Inadequacy of transition period**

Transition period for developing Members and LDC Members have on the whole been inadequate. This inadequacy has resulted from the subjective or rather arbitrary manner, the length of such periods has been determined and the lack of proper programmes designed to phase-in transition period. Therefore, the African Group suggested that:

- Transition periods should not be arbitrarily set or inadequate. They shall be based on objective criteria… that demonstrate under a clear schedule of progress the attainment of the required capacity and of socio-economic development levels for purposes of the agreements; and

- Developing and least-developed country Members shall always have a right to extend transition periods provided that they shall notify the World Trade Organization and when requested commence consultations in the relevant councils and committees.

(c) **Transforming non-mandatory provisions into binding obligations**

S&D provisions under WTO Agreements, were included as part of the settlements negotiated and arrived at, with the clear understanding that the balance they aimed to achieve was necessary and constituted benefits for developing and least-developed Members. This gave rise to legitimate expectations that these obligations relating to special and differential treatment would be faithfully implemented and complied with.

Therefore, the African Group proposes that non-binding provisions need to be made binding in order to provide some means and improve prospects for securing their implementation. This could be accomplished by:

(a) Amendment to the language used in special and differential treatment provisions of the Agreement in question; an/or

(b) Authoritative interpretation of special and differential treatment provisions of the WTO Agreements, under Article IX:2 of the WTO Agreement and the Doha mandate on special and differential treatment.
Accordingly, the African Group proposals set out a list of currently non-mandatory S & D obligations (see Annex-IV), which shall be made binding and enforceable obligations in favour of developing and LDC Members. Thus developing Members and LDC Members may request the Monitoring Body of the Committee on Trade and Development to make recommendations to secure compliance, including through action for enforcement in accordance with the Dispute Settlement Understanding. Where the obligations fall upon developed country Members individually or collectively, the Dispute Settlement Understanding shall govern the enforcement procedures.

(d) Securing implementation of Mandatory Provisions

The African Group is of the view that operationalisation of provisions for mandatory obligations, as in article 16.2 of the TRIPS Agreement, can be improved through better reporting and monitoring procedures.

In this context the African Group sets out a list of mandatory obligations (Annex-III), which shall be implemented immediately and unconditionally. Developed country Members shall notify the laws, measures and policies they adopt in this regard, and report semi-annually on how they are implementing them to the Committee on Trade and Development. Where the obligations fall upon developed country Members individually or collectively, the Dispute Settlement Understanding shall govern the enforcement procedures.

As part of endeavors to operationalise and secure enforcement of S&D provisions, the African Group proposes the following measures.75

(a) Notwithstanding any provision in the Agreements of the World Trade Organization, special and differential treatment shall be included in agreements with the clear understanding and on the basis that they shall be fully binding on Members and enforceable by developing and least developed country Members.

(b) In any Agreements that have objectives and principles of a special and differential treatment nature, the substantive provisions shall detail out in binding obligations the operationalisation of those objectives and principles.

(c) Special and differential treatment commitments shall be inscribed in schedules of commitments or concessions of Members. A Member considering that any commitment it make of a special and differential treatment nature should not be inscribed in its schedule of commitments or concessions shall first obtain the consent of other Members in the General Council in order for that Member to be excluded from the requirement.

75 TN/CTD/W/3
(e) Monitoring of implementation and compliance

The African Group is of the view that the exercise of converting S&D treatment provisions into mandatory provisions, while important, should not be considered as the entire solution to the ineffectiveness of S& D treatment provisions. It is important that the provisions have a mechanism that monitors their operation and addresses any difficulties to ensure that they are utilized and practically beneficial to developing and least-developed Members.\(^{76}\)

Against this backdrop, the following proposal is offered:

“\textit{A Special and Differential Treatment Monitoring Body shall be established under the Committee on Trade and Development, to monitor the implementation of and compliance with special and differential treatment provisions in accordance with this Decision and all relevant Agreements of the WTO, facilitate consultations and co-operation among Members, and advise the Committee on Trade and Development.}”

Such a monitoring mechanism is intended to have three joint and reinforcing elements, namely:\(^{77}\)

\begin{itemize}
  \item a requirement that all WTO Committees keep S&D treatment as a standing agenda item for all their meetings, and that they produce regular reports on S&D treatment;
  \item the establishment of a sub-committee on S&D treatment as a subsidiary organ working under and reporting to the CTD; and
  \item the holding of special annual sessions of the General Council and scheduling dedicated agenda items at the biennial sessions of the Ministerial Conference.
\end{itemize}

Although further discussions would be required on the functional and structural aspects of such a mechanism, there is a consensus among the Members as to the need for such a system. In pursuance to this development, the Special Session of the CTD in its report to the General Council of the WTO, recommended that:

“\textit{…the General Council agree to establish a Monitoring Mechanism for special and differential treatment, and instruct the Special Session of the CTD to elaborate for the Council's approval, the functions, structure and terms of reference of such a Mechanism, taking into account the proposals made by the African Group, and the discussions that have taken place thereon in Special Sessions of the CTD.}”\(^{78}\)

(f) Capacity building

The African Group is of the view that technical assistance and capacity building programmes, as designed and carried out, have not reflected the true objectives and

\(^{76}\) TN/CTD/W/23  
\(^{77}\) TN/CTD/W/3Cor.1  
principles of S&D treatment”. While the CTD has to consider and approve the annual programmes, so far this in itself has not been sufficient to ensure that technical assistance and capacity building activities fully respond to the fundamental needs and concerns of developing Members.

With the view to streamline efforts towards capacity building of the African Group seeks to set out objective bench marks and criteria against which the success and utility of the technical assistance programmes could be measured.

Two annexes, one on “Criteria for Technical and Financial Assistance” (Annex – I) and another on “Criteria in the formulation of Seminar and Workshop Programmes” have been suggested by the African Group.79

(g) The Enabling Clause and the GSP

The Enabling Clause read with the Decision of 25 June 1971 on the Generalized System of Preferences, provides that preferences accorded by developed contracting parties to products originating in developing country Members in accordance with the GSP must be “generalized, non-reciprocal and non-discriminatory”. However, the Enabling Clause is frequently infringed by requests to the WTO for waivers from Article I of the GATT in order to accord privileges or benefits to specific developing Members, excluding other developing country Members.80

According to submission made by Paraguay, this gives rise to discrimination inconsistent with the Enabling Clause. The argument advanced by developed Members in the use of criteria such as: (i) competitiveness criteria; (ii) specialization and development indices; (iii) sectoral and country graduation; (iv) linking the benefits to non-trade issues, such as environmental and social (labour) standards; (v) intellectual property rights; and (vi) the fight against drugs, are based on a subjective, arbitrary and unilateral position taken by certain developed Members, thereby giving rise to discrimination with highly damaging costs to the economies of non-beneficiary developing Members.81

Thus, Paraguay proposes that the GSP schemes encapsulated in the Enabling clause should be elaborated and maintained in the framework of the Agreement: Firstly, with an explicit commitment by developed Members to conform to the principles of non-discrimination and non-reciprocity; and Secondly, if application of flexibility in waiver causes injury to a non-beneficial developing Members:

79 The full text of these annexes are reproduced as Annex VII to IX of this Study.
80 In EC – Condition for the Grant of Tariff Preferences to Developing Countries case where DSB has agreed to establish a panel on the request of India. India, in this case had contended that the GSP under the Enabling Clause was exception to the MFN obligation only to the extent it allowed discrimination in favour of developing countries and the exception was to facilitate and promote the trade of developing countries and so, imposition of conditions unrelated to this objective violated the MFN treatment obligations and the Enabling Clause. EC, on the other hand, argues that the GSP Scheme was an autonomous regime, in full conformity with the EC’s GATT/WTO commitments, including the Enabling Clause. The EC reminded the DSB that its special incentive under the GSP to combat drug production and trafficking, as well as the special incentive arrangements for labour and the environment, were fully in line with internationally recognized objectives aimed at the promotion of sustainable development.
either, adopt an opposition to the granting of such waiver without applying flexibility; or

- the acceptance of reasonable compensation for injury, involving the application of flexibility.

This would ensure a balance between the principle of non-discrimination and flexibility. This view received support from a large number of developing country Members.

The African Group, in order to make the Enabling Clause more meaningful and effective, proposes that:

- In formulating schemes under paragraphs (a) and (b) of clause 1 of the Enabling Clause, developed country Members shall consult under the auspices of the Committee on Trade and Development with developing and least-developed country Members with a view to ensuring that products of export interest to developing and least-developed country Members are accorded meaningful market access that will achieve the objectives set out in Article XXXVI of GATT 1994;

- In this regard, developed country Members shall show to the Committee on Trade and Development how they have included in the programmes specific products of particular export interest to developing and least-developed country Members and taken measures to ensure meaningful market access; and

- It should be understood that the regional arrangements among developing and LDC Members can be for reduction or elimination of tariffs or non-tariff barriers, and that with regard to reduction or elimination of tariffs no WTO body or Members can prescribe any criteria relating to the arrangements. Members shall respect any such arrangements as an exercise of rights that developing and least-developed country Members have under the WTO Agreement.82

(h) Annual Special Session of the General Council on LDC Members participation

The LDC Members had proposed that the General Council of the WTO should establish annual Special Sessions of the General Council on the “Participation of the LDC Members in the Multilateral Trading System” as a regular review mechanism – as mandated by paragraph 3 of the Ministerial Decision83. The agenda of each Special Session will encompass:

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82 TN/CTD/W/3R2, para 74.
83 “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.”
1. the implementation of this Decision and its overall objectives in favour of the LDC Members;
2. the review of the implementation of the specific S&D provisions included in the WTO agreements, decisions and declarations; and
3. overall review of the S&D treatment. 84

RESPONSES

While responses from developed Members including EU, the United States, Canada and Switzerland have been offered separately, there is an essential common strategy discernible. The significant elements of the position taken by developed Members could be summarily stated as follows:

(a) Objectives of the S&D provisions

EC is of the view that all S&D treatment and proposals should be evaluated against the following basic criterion: will this aid the economic development of developing Members and the fuller integration of developing Members into the trading system, as opposed to creating what has been described as permanent exclusion or second tier Membership of the system?

EU views S&D and treatment provisions as steps towards, or flexibility within, common system of rights and obligations rather than a parallel set of provisions in themselves.

Given that S&D treatment is intended to assist integration of Members into the WTO system, S&D treatment provisions should be understood to be an operational part of the integration process, often of a temporary nature, and reflecting developing Members’ specific capacities, limitations or needs in a given area. Their application by Members should thus be regularly reviewed, and Members should cease to apply, or rely upon, such provisions as soon as the problems they were designed to compensate for no longer apply.

(b) Mandatory/non-mandatory S&D Treatment

The identification of provisions that Members consider should be made mandatory must be seen against the objective of strengthening S&D treatment provisions and making them more precise, effective and operational; as such it is a means to reach this objective and not an end in itself. In some cases, making provisions mandatory will not be instrumental in meeting the overall objective. Similarly, the EC wishes to recall that there are other ways to reach that same objective and suggests that Members broaden their attention to include the instruments that prove most appropriate in relation to the overall objective.

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(c) **Addressing specific interest of individual development**

The EC agrees that S&D treatment should not rely on arbitrary or blanket provisions, but be designed to reflect the needs of Members at different levels of development.

Acknowledging that the needs, interest and specific circumstances of least developed Members tend to be very different from those of developing Members, the EC has expressed doubts over the approach taken in some of the submissions which present proposals of across the board – for example sweeping and potentially permanent exemptions for all developing Members – without taking account of the objectively different needs of Members at different developmental levels. The response of Canada is also on similar line:

“…there is a need for flexibility in the application of the rules in order to take the circumstances of individual Members into consideration. Members need to be able to assess their particular needs and request S&D treatment accordingly, rather than rely on broad categories of exemption that would not necessarily meet their requirements. At issue is the pace of adherence, not adherence itself. A possible way forward is for the CTD to take a Member-specific focus and examine methods to develop a predictable cycle to analyze the impact S&D treatment provisions have had on specific Members' capacity to adhere to obligations and realize the economic benefits of Membership.”

(d) **Organisation of work /appropriate forum**

Regarding organization of the work in the Committee on Trade and Development (CTD), the EU agrees on the CTD monitoring and guiding discussions, while noting that the relevant subject-committees may be the best place to consider the specificities of individual S&D treatment proposals. S&D treatment proposals for which negotiating groups exist should, however, be examined in the first place in those groups, and duplication in any case avoided.

As regards S&D treatment proposals in areas already in negotiations, the EC position is they abreast taken up in those negotiations. The road of CTD should be restricted to the whole view of the purpose made in the negotiating rules. Espousing a similar view, Canada added that the relevant subject-committees should report back to the CTD.

The United States is of the similar opinion and work proceeds the road of CTD as largely one of providing leadership and direction dealing with review of S&D treatment rules. The U.S. assess three main functions where the CTD should be involved:

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85 TN/CTD/W/21, para 7.
86 TN/CTD/W/22.
(a) Enhancing integration and exchange among WTO bodies and committees, in effect, serving as a local point for interaction and dissemination of information (for example, in the area of technical assistance, training, and WTO programming).

(b) Assessing implementation and utilization of S&D provisions for purposes of furthering integration of Members into the WTO system by tracking the effective use of transitions and using benchmarks to tailor implementation plans to development needs and provide accountability.

(c) Ensuring more effective and supportive relations with other international institutions, particularly the UNCTAD/WTO International Trade Centre and the International financial institutions.

(e) Enabling Clause: Scope

Hungary is of the view that there should be flexibility in the application of the GSP Schemes and supports differentiation between developing Members. Developed Members like EC and US also expressed similar views. Hungary point out that, in spite of the overall and sectoral levels of development and competitiveness of individual “developing” Members, the term “developing” country was never defined and the original practice of self-election, self-selection remained applicable even today. Further, they argued that even after overall economic development or sectoral competitiveness, no Member has renounced its “developing country” status. The “one size fit all” approach suggested by the developing Members will not work out and that S&D treatment provisions be more tailored to individual circumstances. Thus, there is a need to limit the scope of beneficiaries based on the level of development.

D. POSITIONS OF THE MEMBERS ON THE SPECIAL AND DIFFERENTIAL TREATMENT IN AGREEMENT-SPECIFIC ISSUES

(i) AGREEMENT ON AGRICULTURE (AoA)

The Agreement on Agriculture provides a framework for the long-term reform of agricultural trade and domestic policies over the years to come. This it does by seeking to achieve specific binding commitments in each of the following areas: market access; domestic support; export competition; and to reach an agreement on sanitary and phytosanitary issues. S&D treatment is an ‘integral element’ of the Agreement and takes into account the possible negative effects of the implementation of the reform programme on least-developed and net food-importing developing Members. It provides S&D treatment in three main areas – namely market access, domestic support and export subsidies, as well as regarding export restrictions.

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87 See Proposals of European Communities, TN/CTD/W/22, Proposal of United States, TN/CTD/W/9, etc.
89 Preamble, AoA
In the area of market access, non-tariff border measures are replace by tariffs. Tariffs resulting from this “tariffication” process, as well as other tariffs on agricultural products, are to be progressively reduced within differential time periods.

Domestic support measures that have, at most, a minimal impact on trade (green box policies) are excluded from reduction commitments. Such policies include general government services, for example in the areas of research, disease control, infrastructure and food security.

Against this backdrop, the following proposals have been offered:

**Article 6.2** of AoA provides “that government measures of assistance, whether direct or indirect, to encourage agricultural and rural development … programmes of developing Members, … shall be exempt from domestic support reduction commitments that would otherwise be applicable to such measures….”

In order to make the provision more effective, the African Group proposes that “the permitted subsidies under Article 6.2 shall, be without limitation as to amount, and include any programmes in developing and least-developed country Members for, *inter alia*, promoting food security and rural development, and assisting resource poor or low-income farmers.”

**Article 14** of AoA states that:

“Members agree to give effect to the Agreement on the Application of Sanitary and Phytosanitary Measures”.

The African Group proposed the following understanding to this article:

“It is understood that measures covered by the Agreement on the Application of Sanitary and Phytosanitary Measures shall not be used as disguised restrictions against the trade of developing and least-developed country Members. Members shall biannually report to the Committee on Agriculture any measures taken under the Agreement on the Application of Sanitary and Phytosanitary Measures that affect any products from developing and least-developed country Members.”

**Article 15.1** of the AoA provides that:

“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.”

This provision, according to the African Group should be understood to mean that “where developed country Members are to take measures of a special and differential treatment nature, they shall embody in their schedules of commitments or concessions

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specific special and differential treatment commitments in favour of developing and least-developed country Members, which shall be binding commitments. It is further understood that this Decision shall be without prejudice to the acquis under any preferential regime governing the exports of developing and least-developed country Members by developed country Members.”

**Article 15.2** provides that “developing country Members shall have the flexibility to implement reduction commitments over a period of up to 10 years. Least-developed country Members shall not be required to undertake reduction commitments.”

The African Group felt that the transitional period of time shall be extended under certain particular circumstances such as when: (a) a developing Members is facing adjustment difficulties; and (b) developing and least-developed country Members shall have the right to modify their commitments if this is found necessary to protect the public interest in ensuring food security and alleviating rural poverty.

However, the LDC Members in its proposal pointed out that though this provision is mandatory in nature, “the lack of coherence between WTO and international financial institutions however has subsequently in effect prevented LDC Members from making use of this S&D provisions. Conditionalities that LDC Members face vis-à-vis programmes under the Bretton-Woods institutions constrain LDC Members to adjust their domestic policies in order ‘… to effectively take account of their development needs, including food security and rural development’ (the Doha Ministerial Declaration, paragraph 13).” In order to improve this situation, the LDC Members propose that:

- LDC Members shall be exempted from undertaking reduction commitments, as provided in Article 15.2;
- International financial institutions shall recognize LDCs’ rights to adjust their applied tariffs within the level bound at the WTO, or provide domestic support to agricultural producers, as such need arises for the purposes of agricultural development for long-term food security;
- The WTO Working Group on Trade, Debt and Finance shall regularly examine the coherence between WTO rules and national commitments under financial assistance from international financial institutions, and shall make recommendations regarding international policy coordination.”

Though no formal written response has been offered on these proposals, the discussions within the Committee on Trade and Development are indicative of the following trends.

(a) Most of the developed Members (Canada, USA, EU) share the view that some of these proposals are already under consideration as part of the negotiations in the Committee on Agriculture, and hence should not be duplicated at the CTD.

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91 Proposal by LDC Members, TN/CTD/W/4, para. 30.
(b) As regards the proposal concerning Article 6.2, representatives of USA and Hungary felt that the proposal sought too broad an exemption covering virtually all farm programmes. The US while expressing willingness to look at criteria for exemptions measures in article 6.2 felt that the proposed exemption could negatively impact agricultural experts from all Members, including developing and LDC ones. EU and Switzerland were of the view that the exemptions under Article 6.2 had worked well in the past, and hence sought reasons for effecting changes to it at this stage. Switzerland was however favourably disposed towards introducing additional flexibilities for smaller groups of developing Members, like low-income and transition countries and net food-importers.

As regards proposal concerning Article 14, USA, the EU, Australia and Mexico pointed out that the fact that SPS measures should not act as a disguised restriction to the trade of other Members was already provided for in the SPS Agreement.

As regards the notification sought in the second part of African proposal, attention was drawn to the submission made by Canada to the SPS Committee on how to improve the effectiveness and transparency of S&D provisions. EC felt that it was not always easy to know whether a particular measure would impact developing Members’ trade interests or not. It also wondered the usefulness of the proposal for producing a report every two years, as the WTO Secretariat was already producing a monthly report, in which the measures which affected developing Members were identified.

Kenya clarified that the purpose of the notification obligation was to show how much agricultural trade originating from developing and least-developed country Members was being affected by SPS-related measures. They were not seeking to impose an additional obligation, but merely to ensure transparency.

(c) As regards the proposals relating to Article 15.1 many responses were non-committal. While Canada was “reluctant to prejudge the outcome of negotiations in this regard”, the EC sought further clarification as “Longer time frames were already provided for in the Agreement”. Article 15.2 was already the subject of extensive discussion in the Committee on Agriculture, and hence USA, Switzerland and EU did not see any justification for introducing the right for developing country Members to modify their commitments as envisaged in the second part of the proposal on Article 15.2.

(ii) AGREEMENT ON SANITARY AND PHYTOSANITARY MEASURES (SPS)

The Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) recognises that Members have the right to take sanitary and phytosanitary measures, but should be applied only to the extent necessary to protect human, animal or plant life or health. However, the measures should not be arbitrary or unjustifiably discriminate between Members where identical or similar conditions prevail.92

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92 Article 2, SPS Agreement.
In order to harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members are encouraged to base their measures on international standards, guidelines and recommendations, where they exist. However, Members may maintain or introduce measures which result in higher standards if there is scientific justification or as a consequence of consistent risk, decisions based on an appropriate risk assessment. The Agreement spells out procedures and criteria for the assessment of risk and the determination of appropriate levels of sanitary or phytosanitary protection.

It is expected that Members would accept the sanitary and phytosanitary measures of others as equivalent if the exporting country demonstrates to the importing country that its measures achieve the importing country’s appropriate level of health protection. The Agreement includes provisions on control, inspection and approval procedures.

**Article 9.2** of the Agreement stipulates:

> Where substantial investments are required in order for an exporting developing country Member to fulfil the sanitary or phytosanitary requirements of an importing Member, the latter shall consider providing such technical assistance as will permit the developing country Member to maintain and expand its market access opportunities for the product involved.

Developing Members perception in this regard is that the lack of technical, infrastructural and financial capacity makes it difficult for them to fulfil the SPS requirements of an importing developed country Member, thus restricting market access opportunities for the product involved. Therefore two proposals have been submitted to address this issue.

(a) A group of like-minded developing Members\(^\text{93}\) have proposed to make this provision mandatory by changing the clause “shall consider providing” to “shall provide”. It is further proposed to add the following sentence to the provision:

> “If an importing developing country Member identifies specific problems of inadequate technology and infrastructure in fulfilling the sanitary or phytosanitary requirements of an importing developed country Member, the latter shall provide the former with relevant technology and technical facilities on preferential and non-commercial term, preferably free of cost, keeping in view the development, financial and trade needs of the exporting developing country”.

(b) Another set of proposals have been put forth by the African Group:

- The phrase “substantial investments” in Article 9.2 shall be construed relative to resources of concerned government departments in developing and least-developed country Members and to their development needs. Any changes that would require additional resources to existing levels of current expenditure or

\(^{93}\) Joint Communication from Cuba, Dominican Republic, Egypt, Honduras, India, Indonesia, Kenya, Mauritius, Pakistan Sri Lanka, Tanzania and Zimbabwe (TN/CTD/W/2).
their restructuring, or additional training or staffing, shall be construed to amount to “substantial investments”.

- Where the importing Member does not actually provide such technical assistance, that Member shall withdraw the measures immediately and unconditionally; or the importing Member shall compensate the exporting developing country Members for loss resulting directly or indirectly from the measures.

- It is understood that technical assistance shall be fully funded technical assistance and shall not entail financial obligations on the part of the exporting developing and least-developed country Members.

- It is agreed that WTO shall recommend that impact assessments shall be conducted to determine the likely effect on the trade of developing and least-developed country Members for any proposed standards before adoption, and if the impact would be adverse, the standards would not become applicable until it is established that developing and least-developed country Members that would be affected have acquired the capacity to beneficially comply with them.

The SPS Agreement recognizes the difficulty a developing country may face in complying with the SPS measures in its export. Article 10.1 of the SPS Agreement provides that “in the preparation and application of sanitary or phytosanitary measures, Members shall take account of the special needs of developing country Members, and in particular of the least-developed country Members.”

Cuba, Dominican Republic, Egypt, Honduras, India, Indonesia, Kenya, Mauritius, Pakistan, Sri Lanka, Tanzania and Zimbabwe in their joint communication to the Special Session of CTD, proposed the inclusion of the following sentence to the existing provision:

“If an exporting developing country Member identifies specific problems in complying with a sanitary or phytosanitary measures of an importing developed country Member, the latter shall upon request enter into consultations with a view to finding a mutually satisfactory solution.

In this regard, such special needs shall include: securing and enhancing current levels of exports from developing and least developed country members, maintain their market shares in their export markets, as well as developing their technological and infrastructural capabilities. While notifying a measure, Members shall, inter alia, indicate the following: (i) systems and/or equivalent systems that could be used to comply with such a measure; (ii) the names of the developing and least-developed country Members that could be affected by the applied measure.”

It may be of interest to note that Egypt has submitted a separate proposal to the SPS Committee, that the notification format should capture S&D treatment accorded to developing country Members in relation to Article 10.1 of the SPS Agreement. According to this proposal a new box should be added to the existing notification format.

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94 Art. 10.1 is a mandatory provision as per the WTO Secretariat, Note from the Secretariat, 4 February 2002, WT/COMTD/W/77/Rev.1/Add.1/Corr.1
95 TN/CTD/W/2, p. 4.
96 Recommended notification procedure, Proposal of Egypt, G/SPS/7/Rev.1.
When a new SPS measure is contemplated, the notifying Member should indicate in the newly proposed box, the S&D treatment component of the proposed or adopted sanitary or phytosanitary measure with respect to exports from developing country Members, as well as indicate the developing country Members that could be affected by the measure, and the ways that these Members could be assisted to comply with the measure.

The African Group in the WTO proposed that the “requirement to ‘take account of the special needs of developing country Members’, and in particular least developed country Members” in Article 10.1 shall be understood to mean that Members shall either withdraw measures that adversely affect any developing and least-developed country Members or which they find difficult to comply with, or shall provide the technical and financial resources necessary for the developing and least-developed country Members to comply with the measures.”97 Further, it should be understood to mean that Members shall always initiate consultation and justify the measure in the SPS Committee before adopting the measure.

Article 10.2, which provides that while introducing new SPS measures, “longer time-frame for compliance” for the products of interest to developing Members shall be accorded.98

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.

In the 1998-99 review on SPS Agreement number of developing country Members had stressed the need for “longer time-frames” for compliance, which should be at least 12 months.99 However, the developed countries noted that while importing countries were not willing to compromise public health, governments were willing to be flexible in finalising regulations, and implementation dates were commonly extended.100 In this regard, the Decision on Implementation-Related Issues and Concerns taken at Doha on 14 November 2001, had given an interpretation of the phrase "longer time-frame for compliance" that it “shall be understood to mean normally a period of less than 6 months”.

“Where the appropriate level of sanitary and phytosanitary protection allows scope for the phased introduction of new sanitary and phytosanitary measures, the phrase “longer time-frame for compliance” referred to in Article 10.2 of the Agreement on the

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97 TN/CTD/W/3/Rev.1, para. 54.
98 Article 10.2: “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.” Art. 10.2 is a non-mandatory provision as per the WTO Secretariat Note, 4 February 2002, WT/COMTD/W/77/Rev.1/Add.1/Corr.1
99 Note from the WTO Secretariat, G/SPS/GEN/309, p. 1.
100 G/SPS/R/19
Application of Sanitary and Phytosanitary Measures, shall be understood to mean normally a period of not less than 6 months”.  

**India** in its proposal to the Special Session pointed out that there remains still some ambiguity on the period of the time-frame for compliance owing to the use of word "normally" in this Decision. India proposes that in Article 10.2 of the SPS Agreement, the term "should" be read to express "duty" rather than mere exhortation. This could be clarified through an authoritative interpretation under Article IX.2 of the Marrakesh Agreement Establishing the WTO. It further proposed that the word "normally" in the first sentence of paragraph 3 of the Decision on Implementation-Related Issues and Concerns be deleted. This would make this important S&D provision fully operational and effective and will give necessary flexibility to developing countries.

The second type of transitional period of time is provided under **Article 10.3.**

“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”.

This provision was included at the specific request of developing country Members 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, very few Members had made such a request, even though many Members face problems in complying with the obligations of the agreement. This is because of the recommendatory nature of the language of this provision and granting of such an exception is the discretion of the SPS Committee. To make this provision effective, operational and mandatory, Cuba, Dominican Republic, **Egypt**, Honduras, India, Indonesia, Kenya, Mauritius, Pakistan, Sri Lanka, Tanzania and Zimbabwe in their joint communication proposed that the words “is enabled to” be amended to “shall”. The African Group’s proposal also shares this position.

For further clarification of the provision, the African Group suggested that

- the phrase "specified, time-limited exceptions” shall be understood to refer to periods of not less than 3 years notwithstanding any provision in any WTO Agreements and in any case such periods be adequate for developing and least-developed country Members to undertake any adjustments necessary for them to comply with the provisions of the Agreement.

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101 Paragraph 3.1, Decision on Implementation-Related Issues and Concerns, WT/MIN(01)/W/10.
102 TN/CTD/W/6, para. 5
103 Proposal of India, TN/CTD/W/6
104 TN/CTD/W/2, p. 5.; Till date, no Member has requested a time-limited exception with respect to any obligation under the SPS Agreement, as provided for in Article 10.3, G/SPS/GEN/309, p. 2.
105 Joint proposal of Cuba, Dominican Republic, Egypt, Honduras, India, Indonesia, Kenya, Pakistan, Sri Lanka, Tanzania and Zimbabwe, TN/CTD/W/2
the phrase "taking into account their financial, trade and development needs" shall mean that the periods shall objectively relate to the time and resources necessary for developing and least-developed country Members to undertake necessary adjustments to comply with the provisions of the Agreement.

**Article 10.4** of the SPS Agreement provides that “Members should encourage and facilitate the active participation of developing country Members in the relevant international organizations”.

However, the participation of developing countries in international standard setting bodies remains inadequate and that as a result, international standards were often adopted without taking into account the problems and constraints facing developing countries. This inadequate representation in policy-making committees of international bodies also results in standards development not conducive to their implementation. As the standards under SPS are much more demanding, the active participation of the developing country Members require adequate institutional infrastructure, human and financial resources and effective follow-up capabilities.

India proposes that in Article 10.4 of the Agreement on the Application of Sanitary and Phytosanitary Measures the term "should" be read to express "duty" rather than mere exhortation. This could be clarified through an authoritative interpretation under Article IX.2 of the Marrakesh Agreement Establishing the WTO.

The African Group suggested that a facility should be established within the Global Trust Fund to ensure financial and technical assistance and effectively participate of the developing country Members in meetings of the SPS Committee and relevant international standard setting organizations. The proposal by the African Group also seeks to incorporate the understanding that technology transfer and any technical and financial assistance under the Agreement shall be cost free.

Some other developing country Members have even suggested that standards should only be recognized by the Agreement if the participation of Members from different geographical areas and levels of development had been ensured in their formulation, and if the specific conditions prevailing in developing Members had been taken into account.

No significant responses have been made as regards the proposals stated above.

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106 Art. 10.4 is a non-mandatory provision as per the WTO Secretariat note, 4 February 2002, WT/COMTD/W/77/Rev.1/Add.1/Corr.1
107 An attempt has been made to convene SPS Committee meetings back-to-back with meetings of the main standards setting organizations. For instance, SPS Committee meetings have been held back-to-back with the Codex Alimentarius Commission's meetings, to enable food security experts to combine both meetings in one trip.
108 Some of the problems faced by the developing countries in complying with the SPS Agreement are: the preparation of technical regulation; ensuring the effectiveness of the national standardizing bodies; evaluating how technical regulations of other members could best be met; participation in international standard setting bodies; and inadequacy in infrastructure. <www.southcentre.org> p. 17
109 Proposal of India, para. 9, TN/CTD/W/6.
110 TN/CTD/W/3/Rev.1, para. 54
111 See documents G/SPS/GEN/128, G/SPS/GEN/W/85, G/SPS/R/19 and G/SPS/W/105, cited in WT/COMTD/W/77.
One noteworthy response has been given by Canada to the notification proposal (article 10.1) of Egypt. Canada noted that it would be difficult for the Member notifying its measure to identify *ex ante* the specific exporting Members that may require S&D treatment in order to adapt to the measure, as well as the specific type of S&D treatment that each particular exporting member may require. Secondly, identifying *ex ante* specific S&D treatment for exporting members would more naturally be the responsibility of the exporting Member.

In order to find a common ground on notification procedure, Canada proposed that information regarding S&D treatment be added to the information now required in an Addendum form rather than being included in the Notification form. According to this proposal, a developing country Member affected by the notified measure may contact the notifying member and enter into bilateral discussions that could result in specific S&D treatment with respect to the notified measures. The result of these bilateral discussions is to be reported in the Addendum by the importing Member. Canada feels that information on S&D treatment *ex post* rather than *ex ante* offers more opportunities to the exporting Members to identify those measures for which they wish to seek S&D treatment, while ensuring importing Members are transparent with respect to their response to the request for S&D treatment.

While Egypt welcomes the constructive step taken by Canada to address this issue, it has sought clarification on the following aspects:

What would be the case if no mutually acceptable solution is reached during bilateral discussions?

What is the meaning of the term “specific S&D treatment”? Is it that the S&D treatment will be country specific or otherwise extended to all Members (developed and developing) following the MFN principle?

(iii) AGREEMENT ON TECHNICAL BARRIERS TO TRADE (TBT)

The TBT Agreement extends and clarifies the agreements of TBT reached in the Tokyo Round. The Agreement seeks to ensure that technical negotiations and standards, as well as testing and certification procedures, do not create unnecessary obstacles to trade. However, the Members have the right to establish protection, at levels they consider appropriate, for example human, animal or plant life or health or the environment, and should not be prevented from taking measures necessary to ensure those levels of protection are met. The agreement therefore encourages countries to use international standards where these are appropriate, but it does not require them to change their levels of protection as a result of standardization.

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113 Proposal of Canada, TN/CTD/W/17.
114 TN/CTD/W/24. Comments on the Canadian Proposal
115 This Agreement extents and clarify the TBT Agreement reached in Tokyo Round.
Article 11 of the TBT Agreement stipulates that technical assistance shall be provided for developing country Members in the preparation of technical regulations (Art. 11.1), the establishment of national standardizing bodies, and for the participation in the international standardizing bodies (Art. 11.2). The developed Members should, in the best way possible, provide technical assistance to developing countries. Though this is binding obligation, it has not been effectively operationalized. The African Group therefore proposes that:

“a fund shall be established into which contributions shall be made by Members to assist developing and least-developed country Members in implementing the Agreement. Members that propose to introduce new standards that are required to be notified under the Agreement, shall prior to adoption of the standard, deposit amounts into the fund in accordance with assessments by the Committee based on resource implications for developing and least-developed country Members in complying with such standards”.

Article 12.3 of TBT Agreement provides that:

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

However, there is a proliferation of technical regulations and standards in developed country Members markets, which might have substantially affected developing country exports to developed markets because of the lack of technical, infrastructural and financial capacity to comply with standards or technical regulations. Further, standards, environmental, health or safety, has become a preferred tool of disguised protectionism by technically advanced countries. Though the developing countries are not required to use international standards, the developed countries has been imposing a requirements to modify their standards to conform to those of the developed countries.

A group of developing country Members proposes the addition of the following sentence to the existing provision.

"If an exporting developing country member identifies specific problems of inadequate technology and infrastructure in complying with the technical regulations and standards of an importing developed country Member, the latter shall provide the former with relevant technology and technical facilities on preferential and non-commercial term, preferably free of cost".

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116 TN/CTD/W/3/Rev.2, para. 57
117 Art. 12.3 is a mandatory provision as per the WTO Secretariat, Note from the Secretariat, 4 February 2002, WT/COMTD/W/77/Rev.1/Add.1/Corr.1.
118 Cuba, Dominican Republic, Egypt, Honduras, India, Indonesia, Kenya, Pakistan, Sri Lanka, Tanzania and Zimbabwe, TN/CTD/W/2, p. 6.
However, the African Group viewed that this provision should be understood to mean that the developed Members shall give full technical and financial assistance to developing Members and LDC Members. Further, it is proposed that:

“The WTO shall recommend that impact assessments shall be conducted to determine the likely effect on the trade of developing and least-developed country Members for any proposed standards before adoption, and if the impact would be adverse, the standards shall not become applicable until it is established that developing and least-developed country Members that would be affected have acquired the capacity to beneficially comply with them.”\textsuperscript{119}

\textbf{Article 12.8} of the TBT Agreement provides that “the Committee on Technical Barriers to Trade … is enabled to grant, upon request, specified, time-limited exceptions in whole or in part from obligations under this Agreement. When considering such requests the Committee shall take into account the special problems, in the field of preparation and application of technical regulations, standards and conformity assessment procedures, and the special development and trade needs of the developing country Member, as well as its stage of technological development, which may hinder its ability to discharge fully its obligations under this Agreement. The Committee shall, in particular, take into account the special problems of the least-developed country Members.” However, no request for a time-limited exemption has been made under this Article.

In order to make the provision meaningful for the developing Members the African Group proposes:

- that “the phrase ‘the Committee … is enabled to grant’ shall be understood to mean that the Committee shall grant, and
- the phrase ‘specified, time-limited exceptions’ shall be understood to refer to periods of not less than 3 years and in any case such periods such be adequate for developing and least-developed country Members to undertake any adjustments necessary for them to comply with the provisions of the Agreement.”\textsuperscript{120}

(iv) \textbf{GENERAL AGREEMENT ON TRADE IN SERVICES (GATS)}

The GATS establishes a multilateral framework of principles and rules for trade in services under conditions of transparency and progressive liberalization. The Agreement, however, recognizes the right of Members to regulate the trade in services, in order to meet national policy objectives and, the particular need of developing Members to exercise this right. The Agreement provides the developing Members with the flexibility to open fewer sectors, liberalize fewer transactions and attach conditions to access to achieve their development objectives in the areas of trade in services.

\textbf{Article IV} of the GATS provides for facilitating increased participation of developing country Members through the liberalization of market access in sectors and

\textsuperscript{119} TN/CTD/W/3/Rev.2, para. 57
\textsuperscript{120} Ibid.
modes of supply of export interest to them. The Article stipulates that this objective shall be achieved through strengthening of domestic services capacity, improved access to distribution channels and information networks, and liberalization of market access of interest to developing Members.

**Article IV (Increasing Participation of Developing Members)** provides for

1. 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.

2. 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.

3. 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 Members in accepting negotiated specific commitments in view of their special economic situation and their development, trade and financial needs.

However, the developing Members have been experiencing serious difficulties in participating in the international trade in services. It was stated that the developed Members continued to dominate services trade and that the expected improvement in participation of developing Members had not taken place. This indicated the need for special and more favourable treatment of developing Members, and that developed Members had offered service providers of developing Members inadequate access, whereas those of developed Members had been able to penetrate developing Members' markets. Thus, it is suggested that that developed Members should adopt commercially meaningful commitments in areas of interest to developing Members to make Article IV meaningful and effective.
A joint communication from LDC Members contains the following proposals regarding Article IV:

(a) Due to the imbalances in negotiating strength LDC Members may not be able to achieve the desired outcome through negotiated specific commitments as foreseen in Paragraph 1 of Article IV of GATS. Therefore special priority to LDC Members should be granted at a sectoral level where sector-specific measures could be agreed upon by all Members in terms of the development, trade and financial needs of LDC Members aimed at ensuring their increasing participation in the multilateral trading system. At the beginning of the negotiations on the offers requests in sectoral services, the LDC Members should be asked to indicate the sectors and modes of supply that represent a priority in their development policies, so that the WTO members can take these priorities into account in the negotiation.

(b) A new sub-clause (d) is proposed for addition under article IV.2

“(d) Measures taken in favour of the least-developed Members in the implementation of paragraph 1”.

(c) The following addition is proposed for incorporation under Article IV.3, after the first sentence: “In sectors of their export interest multilaterally agreed criteria for giving priority to the least-developed country Members shall be established, and when developing further disciplines and general obligations under the agreement”.

The proposal of African Group in this regard is that:

- the Committee on Trade and Development shall set periodic benchmarks on financial and technical cooperation and other mutual arrangements under which developed country Members shall accord to developing country Members treatment and concessions.\(^{123}\)

- developed country Members shall reserve quotas for supply of services by developing country suppliers in sectors that developing country suppliers have interests, and

- that developed country Members shall not adopt horizontal limitations with respect to movement of natural persons and shall over a period of 2 years phase out the limitations they maintain at the adoption of this decision.”\(^{124}\)

The African Group proposal envisages reporting by developed country Members, twice every 12 months, to the Council for Trade in Services on how they are implementing the targets set by the Committee on Trade and Development for the operationalisation of Article IV.

\(^{123}\) Proposal of the African Group in the WTO, WT/CTD/W/3/Rev.2, para. 79

\(^{124}\) Ibid.
Article V paragraph 1 provides the rights of a WTO Member to enter into regional agreements for liberalizing trade in services. However, number of conditions is set out for the regional agreement to be WTO consistent. Article V.3 provides flexibility for developing country as regards the conditions set out in paragraph 1, particularly with reference to subparagraph (b) thereof, in accordance with the level of development of the Members concerned, both overall and in individual sectors and subsectors.

The African Group proposed that “the references to "flexibility" and "more favourable treatment" with respect to agreements for liberalisation of trade in services among developing country Members, shall be understood to mean that the agreements shall not be required to comply with the rules set out in Article V, provided that the agreements are entered into within the framework of or form part of wider economic liberalisation or regional integration programmes.”

Article XXV.2 of the GATS provides that “technical assistance to developing Members shall be provided at the multilateral level by the [WTO] Secretariat and shall be decided upon by the Council for Trade in Services”. With a view to clarifying this provision, the African Group proposes the following understanding:

“It is agreed that technical co-operation for developing and least-developed country Members requires the WTO to conclude arrangements with relevant international and regional institutions or organizations to provide frameworks for addressing the supply side and infrastructural constraints of developing and least-developed country Members, and their development needs, in services sectors”.

(v) AGREEMENT ON TRADE RELATED INTELLECTUAL PROPERTY RIGHTS (TRIPS)

Agreement on TRIPS addresses the applicability of basic GATT principles and those of relevant international intellectual property agreements; the provision of adequate intellectual property rights; the provision of effective enforcement measures for those rights; multilateral dispute settlement and transitional arrangement. The Agreement has far-reaching implication for the developing Members, in terms of both access to and cost

125 The conditions provided under Article V.1 (a) and (b) are that such an agreement:
(a) has substantial sectoral coverage and
(b) provides for the absence or elimination of substantially all discrimination, in the sense of Article XVII, between or among the parties, in the sectors covered under subparagraph (a), through:
(i) elimination of existing discriminatory measures, and/or
(ii) prohibition of new or more discriminatory measures,
(b) either at the entry into force of that agreement or on the basis of a reasonable time-frame, except for measures permitted under Articles XI, XII, XIV and XIV bis.


127 On 26 May 2000, the Council for Trade in Services adopted the text of the cooperation agreement between the International Telecommunication Union and the WTO (S/C/9/Rev.1). Subsequently, the ITU Council also adopted the text at its annual session held on 19-28 July. Paragraph 6 of the agreement states that the WTO and ITU secretariats will endeavour to cooperate on matters relating to technical assistance and technical cooperation. WT/COMTD/W/77.

of technology imports from developed Members and the successful patenting and registering of their technologies internationally.\textsuperscript{129}

The TRIPS Agreement is one of the agreements, which envisages S&D treatment provisions in terms of longer period of implementation for the developing and least-developed Members.

**Article 65** of the Agreement provides for transition arrangements for developing Members. Article 65.2 of the TRIPS Agreement provides a transition period of five years for developing Members and 11 years for least-developed Members. The developing Members, which do not provide product patent in an area of technology, would have up to 10 years to introduce such protection (Art. 65.4). Thus, in such areas of technology, developing Members are not required to provide product patent protection until 1 January 2005. Despite this transitional period the developing Members will suffer because of the lack of adequate infrastructure, technical expertise and resources.

The African Group proposes that developing country Members should be entitled to extensions beyond the additional 5 year period under Article 65.4 relating to other areas of technology required to be protected under the TRIPS Agreement.\textsuperscript{130}

However, these transitional provisions in Article 65 are not applicable to Article 70.8. Article 70.8 ensures that, if product patent protection is not already available for pharmaceutical and agricultural chemical product inventions, a means must be in place (commonly known as “mailbox system”) as of 1 January 1995 which allows for the entitlement to file patent applications for such inventions and the allocation of filing and priority dates to them so that the novelty of the inventions in question and the priority of the applications can be preserved for the purposes of determining their eligibility for protection by a patent at the time that product patent protection will be available for these inventions, i.e. at the latest after the expiry of the transitional period (“mailbox” system).\textsuperscript{131} Further, the developing country concerned must offer an ‘exclusive marketing right’ for the product for five years after obtaining marketing approval in that Member, or until a product patent is granted, whichever is shorter (Art. 70.9). The “granting of exclusive marketing rights is a special obligation linked with the enjoyment by Members of the transitional arrangements under Articles 65 and 66 of the Agreement.”\textsuperscript{132} The developing Members have been facing number of problems in complying with the “mailbox” and “exclusive marketing rights”.

These two issues came up for closer scrutiny in the *India – Pharmaceutical Patents (US)* case. As regard the ‘mailbox’ system the issue in this dispute had not been whether India had a mailbox system. Such a system had been established in 1995, and had been used actively and extensively. The issue had been whether this system was consistent with Indian patent law. Article 1.1 of the TRIPS Agreement, *inter alia*, provided that: "Members shall be free to determine the appropriate method of

\textsuperscript{129} <www.southcentre.org>

\textsuperscript{130} Proposal of the African Group in the WTO, TN/CTD/W/3/Rev.2, para.82 (a)

\textsuperscript{131} Article 70.8, TRIPS Agreement. Also see Panel Report on *India – Patents (US)*, para. 7.27.

\textsuperscript{132} *India – Patents (US)*, Panel Report, para. 7.59.
implementing the provisions of this Agreement within their own legal system and practice.” So it was up to India to decide how to implement its obligations under Article 70.8 of the TRIPS Agreement. The Appellate Body (AB) while examining what precisely is the 'means' for filing mailbox applications that is contemplated and required by Article 70.8(a) observed that:

“In our view, India is obliged, by Article 70.8(a), to provide a legal mechanism for the filing of mailbox applications that provides a sound legal basis to preserve both the novelty of the inventions and the priority of the applications as of the relevant filing and priority dates.” (emphasis supplied)

Further, the Appellate Body concluded that “we are not persuaded that India's "administrative instructions" provide a sound legal basis to preserve novelty of inventions and priority of applications as of the relevant filing and priority dates”. This decision of needing ‘sound legal basis’ might have far reaching implication on the domestic legislative practices of the developing Members.

With regard to “exclusive marketing rights” under Article 70.9 of the TRIPS Agreement, the issue was not whether India had denied exclusive marketing rights to eligible products. The issue was whether India was required to establish in its domestic legislation a system for the granting of such rights before any product became eligible. The AB concluded that “both Article 70.8(a) and Article 70.9 are intended to apply as from the date of entry into force of the WTO Agreement.”

The Indian representative at the DSB, while adoption of a report of the panel/AB, which concluded that India had not fulfilled its obligations under the TRIPS Agreement, observed that the overall effect of the reports appeared to dilute, to a certain extent, what developing Members had considered to be the flexibilities available to them under the transitional provisions of the TRIPS Agreement.

The African Group in its proposal to the Special Session of the CTD felt that “there is a clear distinction between "patent rights" on the one hand and "exclusive marketing rights" on the other. The two shall not confer the same rights. Patent rights as set out in Article 28 of the TRIPS Agreement are the following: "to prevent third parties not having the owner’s consent from the acts of making, using, offering for sale, selling, or importing for these purposes the (patented) product" as well as the products obtained directly by the patented process. These rights conferred by a patent, are not the same rights as may be conferred by the grant of exclusive marketing rights. Members have the right and the freedom to define what constitutes exclusive marketing rights, and may do so in light of any interpretations that the General Council or the TRIPS Council may adopt.” The African Group concluded: “there is no requirement to grant exclusive marketing rights until and only if marketing approval is granted.” The same argument

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133 Appellate Body Report on India – Patents (US), para. 58.
134 WT/DS50/AB/R, para. 70.
135 India – Patents (US), Report of the Appellate Body, para. 82.
136 WT/DSB/M/40, page 7
137 Proposal of the African Group in the WTO, TN/CTD/W/3/Rev.2, para. 82 (b)
was put forward by India in *India-patent (EU)* case. However, the AB rejected this interpretation and stated that:

**Article 66.1** of the TRIPS provides the LDC’s an automatic transition period of ten years from the date of entry into force of the Agreement, with the possibility of further extension by the TRIPS Council:

> “…upon duly motivated request by a least-developed country Member…”.

However, it is unclear whether the term “duly motivated” implies an obligation on LDC Members to justify the need for further extension. In order to clarify that there is no such obligation, the LDC Members proposed: “if at the end of the transition period the least-developed Member has not established a viable technological base, a further extension of transition period shall be automatically granted by the TRIPS Council on request by the least-developed Member. Where any other Member is opposed to the extension, it shall rest on that Member to show that the objective of the transition period has been met for that least-developed Member.”

**Article 66.2** of the TRIPS mandates the developed country Members to “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.” However, no concrete steps have been notified by developed Members to the WTO in this regard. The Doha Declaration reaffirmed that “the provisions of Article 66.2 of the TRIPS Agreement are mandatory, it is agreed that the TRIPS Council shall put in place a mechanism for ensuring the monitoring and full implementation of the obligations in question. To this end, developed-country Members shall submit prior to the end of 2002 detailed reports on the functioning in practice of the incentives provided to their enterprises for the transfer of technology in pursuance of their commitments under Article 66.2. These submissions shall be subject to a review in the TRIPS Council and information shall be updated by Members annually.”

To make this provision more effective and operational, the African Group proposed that the developing Members shall give incentives through the enactment of laws or other administrative instruments. This should be of a magnitude and nature that will effectively operate as motivation to transfer technology to LDC’s and the developed country shall report on their implementation to the TRIPS Council.

**Article 67** of the TRIPS Agreement creates a mandatory obligation on the developed Members to provide technical and financial to the developing Members and

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138 TN/CTD/W/4/Rev1, para. 54.
139 WT/COMTD/W/77
140 Paragraph 11.2, Doha Ministerial Declaration.
141 Proposal of the African Group in the WTO, TN/CTD/W/3/Rev.2, para. 83 (ii). “Technology” according to the African Group, for purposes of the Agreement shall include equipment, knowledge and skills including their tacit forms and trade secrets, practical and theoretical training, and insights into the history and global context of innovations and processes relating to particular technologies.
LDC Members, to facilitate the implementation of this Agreement. The implementation of the TRIPS Agreement requires changes in national legislation, the elaboration of judicial procedure for enforcing law and proper administrative framework. Without assistance from the developed Members, a proper adaptation, implementation and general application of the TRIPS Agreement is not possible. In order to make this possible, the LDC Members call for a ‘comprehensive programme of assistance’ that would enable these Members to put in place an array of institutional arrangements including training schemes in order to contribute to the creation of a sound and viable technological base, on the one hand, and to the ability to attract investment and technology, on the other. The programme of assistance, according to the LDC Members should include the following components: (a) Improving the relevant legal framework in line with the general obligations of the Agreement; (b) Enhancing enforcement mechanisms; (c) Increasing training of personnel at the various levels; (d) Changes in law and procedures to comply with the increasing the capability to encourage and monitor technology transfer; (e) Making use of the rights and policy flexibility in the Agreement; and (f) Strengthening or establishing coordination between IPRs, investment and competition authorities.

(vi) GENERAL AGREEMENT ON TARIFFS AND TRADE 1994 (GATT 1994)

Article XVIII of the GATT 1994 provides for ‘Governmental Assistance to Economic Development’. This provision aims to provide flexibility for the governments to promote the rapid development of domestic industries and the needed adjustments where domestic industries experience difficulties in developing and least developed country Members. However, this special and differential treatment provision which grants flexibility of commitments for the developing Members, lacks clarity. It is in this regard that the General Council of the WTO had mandated, as per the outstanding implementation-related issues and concerns agreed in the Doha Conference, “a complete review of Article XVIII … with a view to ensure that it subserves the original objective of facilitating the progressive development of economies in developing Members and to allow them to implement programmes and policies of economic development designed to raise the general standard of living of their people.”

The African Group, in order to improve the clarity this, suggests that the provision shall be understood to mean, “Members shall not be subjected to cumbersome requirements or conditions, or to any requirements and conditions that would undermine the attainment of these goals. In determining whether any requirements or conditions are cumbersome, the views of the developing and least-developed country Members concerned shall be fully accommodated and shall not be prejudiced or rejected except with the consensus of all Members.”

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142 Article 4 of the agreement between the WIPO and WTO contains provisions on legal-technical assistance and technical cooperation. IP/C/6.
144 Ibid, para. 58.
146 TN/CTD/W/Rev.2, para. 34.
Article XVIII:A provides that in order to promote the establishment of a particular industry with a view to raising the general standard of living of its people, the developing or least developed country Member can modify or withdraw concessions under the appropriate Schedules to this Agreement in order to give effect to such agreement, including any compensatory adjustments involved. According to the African Group this provision shall be construed to mean, “they shall not be required under paragraph 7(a) to make or offer unreasonable compensatory adjustments, and compensatory adjustment shall be adequate within the meaning of paragraph 7(b) where the developing and least-developed country Members modifying or withdrawing the concession offer to adopt measures that allow a period of 3 months for exporters based in the Members affected to undertake necessary adjustments.”

Article XVIII:B allows developing Members to maintain, under certain conditions, temporary import restrictions for balance-of-payments purposes. These provisions reflect an acknowledgement of the specific needs of developing Members in relation to measures taken for balance-of-payments purposes. However, in India – Quantitative Restrictions Case, the panel rejected India’s argument that it had a right to maintain balance-of-payment measures until the BOP Committee or the General Council advised it to modify them under Article VIII:12 or established a time-period for their removal under paragraph 13 of the BOP Understanding, and stated that:

“there is no explicit statement in Article XVIII:B or the 1994 Understanding that authorizes a Member to maintain its balance-of-payments measures in effect until the General Council or BOP Committee acts under one of the aforementioned provisions.”

and

“it would be inconsistent with the principle pacta sunt servanda to conclude that a WTO Member has a right to maintain balance-of-payments measures, even if unjustified under Article XVIII:B, in the absence of a Committee or General Council decision in respect thereof.”

The Panel and AB came to the conclusion, based on the report of the IMF, that India did not face a serious decline in its reserves or a threat thereof, and recommended the removal of the measure with immediate effect, without even providing a time-schedule for removal.

In order to improve the provision and make it available for the developing Members the African Group suggested that “short term financial flows shall not be

147 Article XVIII:7, GATT 1994. This provision has not been invoked by developing country Members since the WTO Agreement came into force.
148 TN/CTD/W/Rev.2, para. 36.
149 Since the WTO came into effect, five developing country Members have ceased recourse to Article XVIII:B. Two Members still had recourse to the provisions in 2000.
150 India – Quantitative Restrictions, Panel Report, paras. 5.77-5.80.
151 However, neither Article XVIII:B nor 1994 Understanding nor the WTO’s cooperation agreement with IMF, recognize IMF as the authority competent to analyse WTO Members BOP position.
included in determining the external reserves or surpluses of Members and financial instability shall be duly taken into account as a problem to be addressed over a reasonable period of time when measures under Article XVIII: B shall be maintained. The reasonable period of time shall not be less than 3 years, taking into account differences in industry types.\textsuperscript{152}

**Article XVIII:C** and the Decision on Safeguard Action for Development Purpose\textsuperscript{153} provides that a developing country Member may, respectively, modify or withdraw concessions listed in its Schedule, or adopt a specific measure (safeguard measures) affecting imports which derogates from the requirements of the GATT 1994, in order to promote the establishment of a particular industry with a view to raising the general standard of living of its people.\textsuperscript{154} However, this S&D provision is of little use for the developing Members, especially the LDC Members, because the provisions are crafted in such a manner which made it practically impossible for the majority of the developing Members to use it, or made its use unduly cumbersome and inconsistent with developing Members institutional and financial capabilities in the case of the latter. To enhancing the effectiveness of Article XVIII:C to address the needs of small and vulnerable developing country Members, St. Luis advances the following proposals:

- Basic guidelines setting out the procedures for recourse to Article XVIII: Section C should be elaborated. The guidelines would assist in clarifying certain procedural ambiguities in the text.
- The condition limiting Article XVIII: Section C to circumstances involving "infant industries" should be interpreted broadly to facilitate the implementation of sustainable economic development programmes in small and vulnerable developing country Members, including circumstances where established industries are threatened by an absolute or relative increase in imports. Additionally, there should be clear reaffirmation that the duration and review of the measure must be tied to achievement of the objectives for which the measure was imposed as opposed to any arbitrary absolute number of years.
- The right to compensation and/or retaliation should be waived for an initial period of application given the limited ability of small and vulnerable developing country Members to provide compensatory concessions and the limited impact which restrictions would have on global trade.\textsuperscript{155} It is worth noting that there is a lack of symmetry regarding the application of trade remedies. Generally, the unilateral response of a larger nation against a smaller nation carries markedly more impact than the reverse.

Article XVIII:C should be affirmed as a new distinct special and differential (S&D) trade policy instrument for, *inter alia*, small and vulnerable developing country Members with limited administrative capacities; and not merely a measure of last recourse.\textsuperscript{156} Small and vulnerable

\textsuperscript{152} Para. 37.

\textsuperscript{153} Tokyo Round Decision of 18 November 1979.

\textsuperscript{154} See Article XVIII.7(a), GATT 1994. Only Bangladesh’s has invoked this Article.

\textsuperscript{155} (original footnote) Note that the Agreement on Safeguards waives the right of compensation within the first three years provided that the safeguard measure imposed has been the result of an absolute rather than a relative increase in imports and that such a measure conforms to the provisions of the Agreement; See Agreement on Safeguards, Article 8.3. This grace period does not extend to measures taken under Article XVIII of the GATT 1994; See Article XVIII.7, 12 & 21, GATT 1994.

\textsuperscript{156} (original footnote) The condition stated in paragraph 13 of Article XVIII, permitting recourse to Section C only where "no measure consistent with the other provisions of this Agreement is practicable", appears particularly restrictive; arguably, suggesting that this provision is a measure of last recourse.
developing country Members require effective trade policy instruments – considered vital for successful liberalization – to promote sustainable economic growth and development.\(^{157}\)

The Least-Developed Members (LDC Members) suggested that Members should exercise restraint in seeking compensation from LDC Members when they are modifying or withdrawing a tariff concession. Further amendment is sought to the provision in order to permit safeguard measures without prior approval of the WTO, as in the case of safeguard action taken “in emergency situation” provided in Agreement of Safeguards.\(^{158}\)

Part IV (Articles XXXVI, XXXVII, XXXVIII) of the GATT provides for special and differential treatment of the developing Members and concedes the principle of non-reciprocity by developing Members in trade in goods.

Article XXXVI of GATT 1994 provides that: “the developed …(Members) shall to the fullest extent possible …accord high priority to the reduction and elimination of barriers to products currently or potentially of particular export interest to … developing Members”. However, the use of the words ‘to the fullest extent possible’ gives an impression that it is not mandatory. In order to make the principle embedded in the provision mandatory and operational, the African Group in the WTO proposes that ‘the phrase ‘shall be a matter of conscious and purposeful effort’ in paragraph 9 used in relation to paragraphs 2 to 7 of Article XXXVI, and read together with paragraph 8 of Article XXXVI, shall be understood to mean that the provisions of paragraphs 2 to 7 are binding commitments on the part of developed country Members in favour of developing and least-developed country Members to,

“(a) ensure a rapid and sustained expansion of export earnings of the developing and least-developed country Members;
(b) ensure that developing and least developed country Members secure a share in the growth in international trade commensurate with the needs of their economic development;
(c) provide the maximum market access to products of export interest to developing and least-developed country Members and take measures to stabilise and improve conditions in world markets for these products particularly measures to attain stable, equitable and remunerative prices;
(d) assist in the diversification of the economies of developing and least-developed country Members; and
(f) ensure coherence in global economic policymaking and implementation in a manner that ensures that gains and opportunities in the multilateral trading system are supported and not undermined by programmes implemented by international lending agencies and vice versa;
(g) It is further understood that this Decision shall be without prejudice to the acquis under any preferential regime governing the exports of developing and least-developed country Members by developed country Members.

Accordingly, implementation of the provisions of Article XXXVI shall be subject to reviews twice in every 12 months, in the Committee on Trade and Development. In

\(^{157}\) Proposal of Saint Lucia, TN/CTD/W/8, para. 8.
the reviews, objective criteria shall be used to determine whether the implementation is meaningfully attaining the objectives set out in the provisions, in light of specific targets set by the Committee on Trade and Development.”

Article XXXVII provides that developed contracting parties shall to the fullest extent possible - that is, except when compelling reasons, which may include legal reasons, make it impossible, give high priority to the reduction and elimination of barriers to products currently or potentially of particular export interest to less-developed contracting parties. According to the African Group, paragraphs 1 and 3 of Article XXXVII give rise to a binding obligation. This provision is to be understood that the commitments set out shall be fully implemented and where it is felt that this would not be possible, leave shall be sought in the General Council by the concerned developed country Members on the basis of consultations on specific grounds advanced.

(vi) AGREEMENT ON TRADE-RELATED INVESTMENT MEASURES (TRIMs)

The TRIMs Agreement recognizes that certain investment measures restrict and distort trade. It provides that any Member applying TRIM should be consistent with Article III (national treatment) and XI (prohibition of quantitative restrictions) of the GATT. A list of TRIMs agreed to be inconsistent with these articles is appended to the agreement. The list includes measures, which require particular levels of local procurement by an enterprise (“local content requirements”). The agreement requires mandatory notification of all non-confirming TRIMs and their elimination within a stipulated period (two years for developed, five year for developing and seven years for least-developed Members).

The following proposals have been submitted under this proposal.

Article 3 provides that:

“All exceptions under GATT 1994 shall apply, as appropriate, to the provisions of this Agreement.”

African Group proposes that this provision should be interpreted to mean that, co-operation arrangements, laws, measures and policies adopted on the basis of the provisions of GATT 1994 that operate as exceptions, shall be understood to apply to the provisions of the TRIMs Agreement. More specifically such exceptions shall include:

(a) co-operation arrangements among developing country Members under which certain preferential treatment is accorded to parties to the arrangements;

(b) quantitative restrictions taken in accordance with among others Articles XII, XVIII and XIX of GATT 1994; and

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(c) measures taken to improve living standards in developing country Members under Article XVIII including programmes on incentives relating to domestic content requirements.

Article 4 states that:

“A developing country Member shall be free to deviate temporarily from the provisions of Article 2 to the extent and in such a manner as Article XVIII of GATT 1994, the Understanding on the Balance-of-Payments Provisions of GATT 1994, and the Declaration on Trade Measures Taken for Balance-of-Payments Purposes adopted on 28 November 1979 permit the Member to deviate from the provisions of Articles III and XI of GATT 1994.”

African Group proposes that this provision should be interpreted and applied in a manner that fully supports measures taken by developing and least-developed country Members to safeguard the external financial position, the balance of payments, and sufficiency of reserves.

More specifically, the phrase "free to deviate temporarily from the provisions of Article 2" shall, in view of the structural bottlenecks of developing and least-developed country Members, be understood to refer to a period of not less than 6 years.

Article 5.2 provides a least-developed country Member seven years period to eliminate all TRIMs. The LDC Members feel that this transitional provision, which came to an end in 1 January 2002, should be reviewed with a view to and in the spirit of making it more effective in its operation.

For LDC Members, TRIMs continue to be an important policy tool for strengthening production and export supply base necessary to take full advantage of the market access concessions and preferential schemes made available to them by their trading partners. Flexibility to apply local content requirements assumes particular importance in this regard. As long as they are LDC Members, the transitional period for the use of TRIMs is ineffective as a means to meet their development objectives including industrial policy objectives. LDC Members, thus propose that should be exempted from the disciplines of the Agreement on TRIMs.160

Article 5.3 provides that the Council for Trade in Goods may extend the transition period for the elimination of TRIMs for a developing country Member, which demonstrates particular difficulties and in doing so, the Council for Trade in Goods shall take into account the individual development, financial and trade needs of the Member in question.

According to the African Group, this provision should be understood to mean that the Council for Trade in Goods shall grant requests for extension of or for fresh transition periods for least-developed country Members, and for developing country Members that are eligible under the Agreement on Subsidies and Countervailing Measures to maintain

160 TN/CTD/W/4
subsidy programmes that may wholly or in part be covered by or have a relation to the
TRIMs Agreement.161

(viii) AGREEMENT ON IMPORT LICENCING

The Agreement on Import Licensing Procedure requires parties to publish
sufficient information for traders to know the basis on which licenses are granted. The
Agreement requires notification of the institution of import licensing procedure and also
offer guidance on the assessment of applications. The agreement sets out criteria under
which ‘automatic licensing procedures’ are assumed not to have trade restrictive effects
and with respect to ‘non-automatic licensing procedure’, their administrative burden for
importers and exports should be limited to what is absolutely necessary to administer the
measures to which they apply.

Article 1.2 states that the procedure used for import licensing procedure should
be implemented taking into account the development purposes and trade needs of
developing country Members. According to the African Group, it is understood that the
requirement to take into account the "development purposes and trade needs of
developing country Members" means that import licensing regimes shall be designed in a
manner that prevents adverse effects to the trade of developing country Members. In this
regard, the regimes shall specifically be expeditious in relation to the trade of developing
country Members.

Article 3.5(a) (iv) (Non-automatic Import Licensing) provides that:

"Members shall provide, upon the request of any Member having an interest in
the product concerned, all relevant information concerning:

….

(iv) where practicable, import statistics (i.e. value and/or volume) with respect
to the products subject to import licensing. Developing country Members
would not be expected to take additional administrative or financial burdens on
this account."

Thailand feels that the above provision could be interpreted to mean that, in
providing the import statistics, there is room for flexibility for Members that are
developing country Members not to take additional administrative and financial burdens.
However, in view of the word "would" appearing in the last sentence of the provision,
there is some doubt as to the mandatory nature of the provision. Thus Thailand proposes
that the word "would" be replaced by "shall".162

161  TN/CTD/W/3R2
162  TN/CTD/W/7
Tabling a similar proposal the African Groups suggested that the last sentence of subparagraph (a)(iv) of Article 3.5 stating that "developing country Members would not be expected to take additional administrative or financial burdens on this account" shall be construed to mean that developing country Members shall not be required to take any measures additional to existing measures.

**Article 3.5 (j)** states that Members should consider the import performance of the applicant and shall examine the reasons for non-utilization and take these reasons into consideration while allocating new licences.

However, in view of the word "should" appearing in the last sentence of this provision, referring to special consideration to those importers importing products originating in developing Members and in particular the least-developed country (LDC) Members, there is lack of clarity on whether the provision is mandatory.

India proposes that this provision could be made mandatory either through an authoritative interpretation or by replacing the word "should" in the last sentence by "shall". In the context of Article 3.5 (j) of the Agreement on Import Licensing Procedures, making the last section mandatory would help developing Members, especially the least-developed ones, to increase their share in exports of products of export interest to them, as envisaged in the preamble to the Marrakesh Agreement.\(^{163}\)

The African Group has also tabled a similar proposal in this regard and suggested that the provision shall be construed to require that priority in license allocation shall be accorded to importers from developing and least-developed country Members.\(^{164}\)

(ix) **AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES**

The Agreement on Subsidies and Countervailing Measures is built on the Agreement on Interpretation and Application of Article VI, XVI and XXIII, which was negotiated in the Tokyo Round. This agreement establishes three categories of subsidies – prohibited, actionable and non-actionable. The agreement concerns also with the use of countervailing measures on subsidized imported goods.

Recognizing the important role played by subsidies in the economic development programmes, the LDC Members and developing Members that have less than $1,000 per capita GSP are exempted from disciplines on prohibited export subsidies, and have time-bound exception from other prohibited subsidies. Other developing Members have a time bound exception (8 years). Countervailing investigation of a product originating from a developing-country member would be terminated if the overall level of subsidies does not exceed 2 per cent (3 per cent for certain developing Members) of the value of the product, or if the volume of the subsidized imports represents less then 4 per cent of the total imports for the like product in the importing signatory.

\(^{163}\) TN/CTD/W/6
\(^{164}\) TN/CTD/W/3R2
Article 3.1(b) states that:

“subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.”

Article 27.3 provides that:

“The prohibition of paragraph 1(b) of Article 3 shall not apply to developing country Members for a period of five years, and shall not apply to least developed country Members for a period of eight years, from the date of entry into force of the WTO Agreement.

The LDC Members proposal points out that under the TRIMs Agreement local content requirements (preference to domestic products over imported products) would seem to be prohibited once the transitional period has expired. But the Agreement on Subsidies and Countervailing Measures seems to allow import substitution subsidy for LDC Members for a period of eight years from the date of entry into force of the WTO Agreement. It would seem that if such a subsidy is in connection with trade-related investment measures, it would be in violation of the Agreement on TRIMs.

To remove this seeming contradiction between time-bound derogation the Agreement on Subsidies and Countervailing Measures (prohibition of subsidies contingent upon the use of domestic over imported goods) and the Agreement on TRIMs, the LDC Members proposes that an unrestricted recourse to the use of local content measures be provided in both Agreements as long as a country remains in the LDC status.

Article 27.1 states that:

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

The African Group views that this provision should be understood to mean that developing country Members shall have a right to use subsidies as may be necessary for their economic development. Accordingly, it is also proposed that, extensions shall be granted under Article 27.4 of the Agreement bearing in mind the important role subsidies play in the economic development of developing country Members.

Article 27.4 provides that any developing country Member shall phase out its export subsidies within the eight-year period, and shall eliminate them within a period shorter when the use of such export subsidies is inconsistent with its development needs. This provision also provides that the Committee shall grant extension of implementation period beyond 8 years taking into consideration the economic, financial and development needs of the developing country Member.

165 TN/CTD/W/4
166 “Any developing country Member referred to in paragraph 2(b) shall phase out its export subsidies within the eight-year period, preferably in a progressive manner. However, a developing country Member shall not increase the level of its export subsidies,” and shall eliminate them within a period shorter than that provided for in this paragraph when the
The African Group made two proposals for interpreting and application of this article. Firstly, it proposed that the phrase "inconsistent with its development needs" should refer to where otherwise prohibited or actionable subsidies would clearly not benefit any domestic industry.

Secondly, the provision should be understood to mean that developing country Members shall not be prevented from seeking extensions on grounds of not strictly following the time frames in Article 27.4 and the Decision on Procedures for Extensions Under Article 27.4 for Certain Developing Country Members (G/SCM/39).

**Article 27.8** states that:

“There shall be no presumption in terms of paragraph 1 of Article 6 that a subsidy granted by a developing country Member results in serious prejudice, as defined in this Agreement. Such serious prejudice, where applicable under the terms of paragraph 9, shall be demonstrated by positive evidence, in accordance with the provisions of paragraphs 3 through 8 of Article 6.”

The African Group has proposed that this provision should be understood to mean that in consultations and in any proceedings, there shall be no presumption of serious prejudice whatsoever including on the basis of any percentage or amount of subsidization where developing country Members grant subsidies; and that any serious prejudice shall be demonstrated exclusively by positive evidence.

**Article 27.9** provides that:

“Regarding actionable subsidies granted or maintained by a developing country Member ..., action may not be authorized or taken under Article 7 unless nullification or impairment of tariff concessions or other obligations under GATT 1994 is found to exist as a result of such a subsidy, in such a way as to displace or impede imports of a like product of another Member into the market of the subsidizing developing country Member or unless injury to a domestic industry in the market of an importing Member occurs.”

The African Group has proposed that it is understood that nullification and impairment in cases of actionable subsidies that developing country Members grant or maintain, shall be construed to mean only the displacement or impediment of imports of a like product into the market of the developing country Member or injury to a domestic industry in the market of the importing Member.

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.”
Article 27.13

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

According to African Group, Article 27.13 shall be understood to cover any privatization programmes undertaken within the period from 1 January 1995 and that developing country Members may grant or maintain the subsidy programmes under Article 27.13 to ensure good adjustment of their economies. It is further understood that "limited period" refers to a period of not less than 8 years.

Article 27.15 provides that the Committee shall, upon request by an interested developing country Member, undertake a review of a specific countervailing measure to examine whether it is consistent with the provisions of paragraphs 10 and 11 as applicable to the developing country Member in question.

African Group has proposed that the term “interested developing country Member” shall be construed to refer to any developing country Member regardless of any subsidy programmes maintained, on the basis that developing country Members have an abiding interest in the use and operation of subsidies due to their importance in the rapid economic development of developing country Members.167

(x) UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU)

The Understanding on the Rules and Procedures Governing the Settlement of Disputes (DSU), is considered to be the cornerstone of the WTO legal system. The DSU has taken into account the special needs of the developing Members and has provided for a number of S&D treatment provisions. However, in its actual working, the developing Members have expressed doubts as to the effectiveness of the dispute settlement process and the lack of clarity regarding the manner in which the S&D provisions are implemented. Further, it was stated that the current DSU lacks general and horizontal provisions applicable to all developing country Members, which is different from other WTO agreements.168

The developing Members in the course of the review of DSU in 1998-99 and later has been suggesting ways to improve the S&D provisions in DSU. The major problems highlighted by the proposals are that S&D treatment provisions of the DSU are not articulated in specific terms and that this needed to be corrected. Even though the words "shall" and "should" have been used, it is claimed that there is no way to ensure that such

167 Proposal from African Group, TN/CTD/W/3R2
treatment is accorded to developing Members in practice. So there is a need for developing a monitoring mechanism to check whether such requirements are adhered to. It was also suggested that there is also a need to strengthen the language of, for example Article 4.10 and Article 21.2, by replacing the word "should" by "shall". Additionally, it has been suggested that specific guidelines need to be evolved to ensure rigorous implementation of provisions in favour of developing Members.169 Some of the provisions under which the WTO Members should safeguard the interests of the developing Members are Articles 4.10, 10.8, 12.10, 12.11, 21.2, 21.7 and 21.8. Some of the important proposals submitted in the Special Session of the CTD are highlighted below.

**Article 4.10** provides that:

“During consultations Members should give special attention to developing country Members’ particular problems and interests.”

Under the DSU consultation is mandatory and is intended to provide opportunity to the disputing parties to know each other’s views and to the defending party to explain its measure subjected to the dispute. However, there is no clear indication as to how this provision is implemented.170 For making this S&D provision mandatory, effective, operational, and of value to the developing counties, India proposes firstly, the word "should" be replaced by "shall" to make it mandatory. In this regard the African Group suggested that consultation requests of the developing Members and LDC’s shall always be accepted. Secondly, as there is no precise definition of the term “should give special attention”, it should mean:

1. “if the complaining party is a developed Member and if it decides to seek establishment of a panel, it should be made mandatory for it to explain in the panel request as well as in its submissions to the panel as to how it had taken or paid special attention to the particular problems and interests of the responding developing country;
2. if the developed Member is a defending party, it should be made mandatory for it to explain in its submissions to the panel as to how it had addressed or paid special attention to the particular problems and interests of the complaining developing country;
3. the Panel, while adjudicating the matter referred to it, should give ruling on this matter as well.”171

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170 One developing country Member complained that its request for consultations with another Member (developed) had been disregarded, thus discriminating against and impairing its interests in deviation from the provisions of Article 4.10 of the DSU., WT/DSB/M/7, p. 2.
171 Proposal of India, para. 12, TN/CTD/W/6; This proposal has also been endorsed by Cuba, Dominican Republic, Egypt, Honduras, Indonesia, Kenya, Mauritius, Pakistan, Sri Lanka, Tanzania and Zimbabwe also. See Proposals on DSU by Cuba, Dominican Republic, Egypt, Honduras, India, Indonesia, Kenya, Mauritius, Pakistan, Sri Lanka, Tanzania and Zimbabwe, 9 October 2002, TN/DS/W/19. The African Group has also made a similar proposal. Proposal of the African Group in the WTO, TN/CTD/W/3/Rev.1, para. 84.
**Article 12.10** provides for extending the consultation period for the benefit of the developing countries. The second part of this Article directs the panel to give “sufficient time” for the developing Member to prepare and present its argumentation before the panel.

Though this provision is considered as mandatory,\(^{172}\) it is the discretion of the DSB Chairman whether to extent the consultation period and if so, for how long. As regards the second part of Article 12.10 the panel has not discretion because it shall allow sufficient time. However, the Article does not provide any guidance either to the DSB Chair or to the panel as to how much additional time should be given.\(^{173}\) This has made this Article inoperable or of limited use for the developing country Members.\(^{174}\)

For clarifying these ambiguities and making it effective and operational, Cuba, Dominican Republic, Egypt, Honduras, India, Indonesia, Kenya, Mauritius, Pakistan, Sri Lanka, Tanzania and Zimbabwe in their joint communication proposed that the words “whether” and “if so, for how long” be deleted from the second sentence and the words “for not less than 15 days, in cases of urgency as envisaged in paragraph 8 of Article 4, and not less than 30 days in normal circumstances” be added towards the end of the sentence.\(^{175}\) This will give guidance to the DSB Chair in the extension of consultation.

Similarly, in the third sentence, after the expression “sufficient time” the words “not less than two weeks extra in normal circumstance,” be inserted and in the place of ”argumentation” the words ‘first written submission and not less than one week extra thereafter at each stage of written submission or presentation.’ The last sentence should be rephrased as: ‘The additional time taken above shall be added to the time frames envisaged in Article 20 and paragraph 4 of Article 21’.”\(^{176}\) However the African Group felt that the period to prepare and present argument should not be less than 6 months or a longer period if requested by the developing Member.\(^{177}\)

**Article 21.2** provides that:

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\(^{172}\) Art. 10.1 is a mandatory provision as per the WTO Secretariat, Note from the Secretariat, 4 February 2002, WT/COMTD/W/77/Rev.1/Add.1/Corr.1.

\(^{173}\) In a dispute, a developing country defendant contended that the process raised a number of questions in relation to the DSU such as (i) the real difficulties faced by developing countries on the insistence by a developed country that consultations be held only in Geneva; (ii) the meaning and significance of the consultations stage; (iii) whether a Member could decide unilaterally that consultations had been concluded in particular since Article 12.10 of the DSU provided that “In the context of consultations involving a measure taken by a developing country Member, the parties may agree to extend the period established in paragraphs 7 and 8 of Article 4.” WT/DSB/M/2, p. 4. See also WT/COMTD/W/77, p. 71.

\(^{174}\) The first was never been used by the developing countries and the second part was invoked only one by India in *India – Quantitative Restrictions* (QR) case (DS90) and got ten extra days for preparation of its first written statement.

\(^{175}\) Joint Proposal of Cuba, Dominican Republic, Egypt, Honduras, India, Indonesia, Kenya, Mauritius, Pakistan, Sri Lanka, Tanzania and Zimbabwe, TN/CTD/W/2, p. 2-3

\(^{176}\) Ibid.

\(^{177}\) WT/CTD/W/3/Rev.1, para. 86(ii).
“Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject of dispute settlement”.  

This provision is part of an Article that requires the Dispute Settlement Body (DSB) to keep under surveillance, the implementation of its rulings, following the adoption of the panel/Appellate Body reports and is placed at the beginning of the long and important Article 21.  However, there is no clear indication as to how this provision has been carried out. The Arbitrator in Indonesia – Autos (21.3 Arbitration Report), while taking into account Indonesia's status as a developing country in determining the "reasonable period of time" that “although the language of this provision is rather general and does not provide a great deal of guidance, it is a provision that forms part of the context for Article 21.3(c) of the DSU….” The Arbitrator added that the time was granted to Indonesia because it “is a developing country that is currently in a dire economic and financial situation” and “its economy is 'near collapse'. ” However, the Arbitrator concluded “in a 'normal situation', a measure such as the one required to implement the recommendations and rulings of the DSB in this case would become effective on the date of issuance.” It is interesting to point out here that this S&D provision has been introduced to give developing Members special treatment in “normal situations”.

India suggested that clarifying the phrase “matters affecting the interests of developing country Members” could increase the utility of the provision and suggests firstly, to replace the word "should" with "shall", so as to make this provision mandatory and Secondly, this provision shall be made mandatory for the panel and AB to interpret it as an overarching provision in all disputes involving a developing country Member as a disputing party and more specifically:

“if the defending party is a developing Member and the complainant, a developed member, RPT (Reasonable Period of Time): 15 months should be considered as normal RPT and if the measure at issue is change of statutory provisions or change of long held practice/policy [like Quantitative Restrictions/Balance of Payment (QRs/BOP)], RPT should be two to three years and panels/AB should indicate requirement of more RPT;
21.5 Procedures: Time for completion of 21.5 panel proceedings should be increased from 90 days to 120 days; and the panel should give all due consideration as any normal panel would give to the particular situation of developing country Members. Filing of status report should be in alternate meetings rather than in every regular meeting.

if the complaint is by a developing Member against a developed Member:

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178 Art. 10.1 is a non-mandatory provision as per the WTO Secretariat, Note from the Secretariat, 4 February 2002, WT/COMTD/W/77/Rev.1/Add.1/Corr.1.
179 The Article also provides for determination of reasonable period of time for compliance of the DSB rulings; in case of disagreement, for initiation of further dispute settlement proceedings to determine whether the defendant Member has complied with DSB rulings; and for receiving status reports on implementation of DSB rulings at every regular DSB meeting six months after adoption of the panel/AB reports.
180 Indonesia – Autos, 21.3 Arbitration Report, para. 24. Indonesia was giver six months additional period of time to implement the report. See also Chile – Alcoholic Beverages, 21.3 Arbitration Report, para. 45.
The defending developed country Member should be given no more than 15 months of RPT in any circumstance; existing 90 days time limit for 21.5 procedures should be observed strictly. In case of delay, it should entail an obligation to compensate for continuing trade losses to the developing country complainant.\(^{181}\)

The African Group offered another suggestion, for paying "particular attention" to the "interests of developing country Members" in paragraph 2, and consideration of "what further action the DSB might take" in paragraph 7. According to the suggestion, these phrases should be understood to mean, in relation to the enforcement of DSB reports, monitory compensation or making some other forms of compensation to the developing country Member, and DSB authorised collective suspension of obligation by all WTO Member Members.\(^{182}\)

**Article 21.8** states that:

> "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."

There was only one instance this provision was invoked, however, no specific action has been taken.\(^{183}\) It has been pointed out that this Article does not oblige the other party to the dispute to accept such an offer. To effectively implementing this provision it was suggested that a sentence could be added saying that the parties to the dispute shall enter into such a process, in good faith, in accordance with the provisions of Article 5.\(^{184}\)

Another approach proposed by Jamaica was to "require the panels and Appellate Body to consider these issues in making their rulings. This approach will be in keeping with the recognition, by Parties to the Agreement Establishing the WTO, of the need for positive efforts to ensure that developing Members secure a share in the growth of international trade commensurate with the needs of their economic development and to raise their standard of living."\(^{185}\) Further, Jamaica suggested that the meaning of Article 21.8 needs to be clarified with respect to the role of the DSB, particularly in light of its decision-making functions. Jamaica also proposes that this provision be amended to apply to cases brought by and against developing country Members.

**Article 22** provides for securing compliance with the panel/AB decision. However, securing compliance from the defaulting Member is proving to be a difficult task, especially when the developing Members is left with no other option but to suspend concessions or other obligations. Further, because of the imbalance in trade between developed and developing Member and economic cost of withdrawal of concessions this option is practically not available to developing members. This position of the

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183 WT/DSB27/ARB/ECU
184 WT/COMTD/W/77, p. 72.
185 Proposal from Jamaica, TN/D/W/21, p.3
developing country was clear from the Equator's attempt to retaliate against European Communities (EC) in EC – Bananas Case.

To make this option available to the developing Members, Cuba, Dominican Republic, Egypt, Honduras, India, Indonesia, Kenya, Pakistan, Sri Lanka, Tanzania and Zimbabwe propose that “a complaining developing-country member should be permitted to seek authorisation for suspending concessions and other obligations in sectors of their choice. They should not be required to go through the process of proving that, (1) it was not "practicable or effective" to suspend concession in the same sector or agreement where the violation was found; and (2) the "circumstances are serious enough" to seek suspension of concessions under the agreements other than those in which violation was found exist.” For this purpose, a new paragraph 3bis, it is proposed, be inserted in Article 22 as follows:

"Notwithstanding the principles and procedures contained in paragraph 3, in a dispute in which the complaining party is a developing-country Member and the other party, which has failed to bring its measures into consistence with the Covered Agreements is a developed-country Member, the complainant shall have the right to seek authorization for suspension of concessions or other obligations with respect to any or all sectors under any covered agreements."186

Article 24 provides that at all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least-developed country, particular consideration will be given to their special situation, including the exercise of due restraint by the complaining party, and the offer of good offices, conciliation and mediation by the WTO Director-General or the Chairman of the DSB.

However, not a single least-developed country has been involved in disputes as complainants or respondents, or as third party in panel proceedings.187 Thus, there is a need to clarify how to determine whether such restraint was exercised and what the consequences would be if it is established that such a restraint was not exercised. The LDC Members is of the view that this can be achieved if the panels is given “the authority to determine whether a party bringing a complaint against an LDC has a prima facie case and whether the complainant exercised due restraint. Restraint in this sense could include a determination whether it would have been better in the circumstances to invoke the assistance of the ‘good offices of the Director-General’, whether due diligence was exercised with the objective of actually settling the dispute and what the outcome was. Article 24.2 should therefore be amended by removing ‘upon request by a least-developed country Member’ to make it incumbent on the complaining party to seek the ‘good offices’ of the Director-General.”188

The African Group, in this regard, suggested that the provision should be understood to mean, “that panels shall before proceeding with the case first determine whether the Member bringing the case has given particular consideration to the special

187 WT/COMTD/W/77, p. 73.
188 Proposal of the LDC Members, TN/DS/W/17, para 17.
situation of the least-developed country Member. In this regard, the panel shall take into account all relevant factors including, the value of any alleged nullification or impairment, the possible harm to the economy and resources of the least-developed country Member that could result from the case, and the capacity in the circumstances of the least-developed country Member to effectively deal with the case.\textsuperscript{189}

The LDC Members further highlighted the negative impact of retaliatory action and demand for compensation (Art. 22) against the LDC Members and proposed that Members should completely excluding LDC Members from these demands and “in the alternative it could be recognized ‘a least-developed country Member against whom a case has been determined shall be expected to withdraw the offending measure’.”\textsuperscript{190}

\textbf{Article 27.2} provides that special assistance and advice will be made available to developing countries in disputes. Although technical assistance is currently provided by the WTO, such assistance has proven to be inadequate in assisting developing Members to take advantage of the Dispute Settlement Mechanism. It is felt that there is a need to review the application of Article 27.2 to make it more operational and effective in extending assistance to developing Members. In this regard the Member Members suggests that the budget of the Secretariat needs to be further supplemented to enable the Secretariat to hire full time consultants, as part-time basis consultant has proven to be problematic for developing country Members.\textsuperscript{191}

Jamaica in its contribution pointed out that the current system in which legal consultants only offer advice and do not assist in the preparation of comprehensive arguments and submissions is totally inadequate to meet the needs of developing Members advocating their case in DSU proceedings. Although the independent WTO Law Advisory Centre has been established to assist developing-country Members, the cost of membership still prohibits some developing Members from accessing its facilities. Additional independent mechanisms need to be developed to ensure that developing Members not only obtain general legal advice, but can also obtain assistance in arguing their case before a panel at a cost, which these Members can afford.\textsuperscript{192}

Further, it was suggested that the posts of legal officers could be upgrade so that experienced personnel can be employed for this purpose.\textsuperscript{193} Also, the legal advisors should constitute an independent legal unit within the Secretariat in order to ensure the neutrality required of the Secretariat itself. It has also been stated that the concept of ‘neutrality’ of the WTO Secretariat needs to be more clearly defined and perhaps more loosely implemented as a strict implementation of ‘neutrality’ limits the nature and scope of legal services made available to the developing Member Members and prevents legal advisors of the WTO from effectively helping developing country Members in defending

\begin{footnotesize}
\begin{enumerate}
\item WT/CTD/W/3/Rev.1, para. 89.
\item Proposal of the LDC Members, TN/DS/W/17, para 18.
\item Proposal of Jamaica, TN/DS/W/21. See also WT/COMTD/W/77, p. 73
\item Proposal of Jamaica, TN/DS/W/21. A similar proposal was put forward by the African Group, TN/CTD/W/3/Rev.1, para. 90 (a).
\item Job 6645, para. 327-339, WT/COMTD/W/77, p. 73
\end{enumerate}
\end{footnotesize}
or pleading a case.\textsuperscript{194} In this regard African Group suggested that the phrase ‘continued impartiality of the Secretariat’ in paragraph 2 shall be understood to mean that the qualified legal expert made available to assist a developing country Member in a case shall assist the country for the duration of the case and not continue to be counsel for the country after the case.\textsuperscript{195}

Another suggestion was to establish a trust fund to finance strategic alliances with lawyers' offices or private firms to expand the scope of consultancy and advisory services. As regards the appointment of private lawyers, Jamaica wishes to see the right of Members to constitute their delegations according to their wishes, both in panel and appellate proceedings, recognized in the DSU text.\textsuperscript{196}

\section*{E. PROPOSALS WHERE CONSENSUS HAS EVOLVED}

In all, Members agreed to make recommendations to the General Council on 12 Agreement-specific proposals and two crosscutting issues. However, there were different views on whether these should be harvested now. While some Members considered that this should be done, others expressed a preference for doing so only after further progress had been made on the seventy-five or so remaining Agreement-specific proposals. Accordingly, the Special Session of the CTD recommended that the General Council take note of the recommendations made on the 12 Agreement-specific proposals on which Members had agreed in principle, but revert to the question of their adoption at a later date.

On 5 May 2003, the Chairperson of the General Council circulated a categorised list of agreement-specific proposals. According to this proposed categorization, the proposals are broken down into three categories:

\textbf{Category I:} 38 agreements-specific proposals falls under this category. This categories includes 12 agreement-specific issues agreed by the Members ‘in principle’ and 26 additional proposals that the Chairman feels there is a likelihood of agreement. These proposals shall be agreed at/before the Cancun Ministerial Conference.

The 12 Agreement-Specific proposals where consensus has evolved are:

\subsection*{1. General Agreement on Trade in Services (GATS)}

As regards Article IV:3, it was agreed that the information to be provided by Members shall indicate how the requirement that special priority be given to least-developed country Members in the implementation of paragraphs 1 and 2 of Article IV is being met, and that contact points, in this context, shall provide information of particular interest to services suppliers from least-developed country Members.

\begin{thebibliography}{99}
\bibitem{194} Ibid.
\bibitem{195} Proposal of African Group in the WTO, TN/CTD/W/3/Rev.1, para. 90 (b).
\bibitem{196} Proposal of Jamaica, TN/DS/W/21. Jamaica also welcomes the decision of the Appellate Body in the \textit{Bananas} case to allow the participation of private lawyers.
\end{thebibliography}
Further, it is agreed that in all services negotiations, whether broad-based rounds of negotiations or separate negotiations on specific sectors, modalities shall be developed in order to allow the priorities of least-developed country Members to be presented and duly taken into account.

As regards Article XXV, the WTO Secretariat was instructed to pursue with a view to concluding arrangements with relevant international institutions that have the technical assistance capacity to assist developing and least-developed country Members in addressing their supply-side and infrastructural constraints and their development needs in the services sector. This shall be without prejudice to the prerogative of the Council for Trade in Services to decide upon technical assistance to developing countries which shall be provided at the multilateral level by the Secretariat, in accordance with Article XXV.2.

As regards Paragraph 6 of the GATS Annex on Telecommunications, it was agreed that the General Council shall instructs the Council for Trade in Services to put in place arrangements for prompt notification of any measures taken with regard to the implementation of subparagraphs (a) to (d) of paragraph 6 of the Annex on Telecommunications.

2. Agreement on Trade-Related Aspects of Intellectual Property Rights (Trips)

As regards Article 67, it was agreed that technical and financial cooperation shall be provided on request and on mutually agreed terms and conditions, with due consideration given to comprehensive programmes comprising such components as improving the relevant legal framework in line with the general obligations of the Agreement, enhancing enforcement mechanisms, increasing training of personnel at the various levels, assisting in the preparation of laws and procedures in an effort to encourage and monitor technology transfer, making use of the rights and policy flexibility in the Agreement, and strengthening or establishing coordination between intellectual property rights, investment and competition authorities.

It is also agreed that the General Council instructs the Council for Trade-Related Intellectual Property Rights to annually review the state of implementation of the Agreement between the World Intellectual Property Organization and the World Trade Organization, taking into account opportunities for technical assistance as provided for in the Agreement.

3. Enabling Clause (Decision of 28 November 1979)

It is agreed that the General Council shall confirms that the terms and conditions of the Enabling Clause shall apply when action is taken by Members under the provisions of this Clause.

4. Rules Relating to Notification Procedures
Recognizing the practical difficulties faced by least-developed country Members in abiding fully by their notification obligations, it was agreed that the General Council shall instruct the Sub-Committee on Least-Developed Countries to examine possible improvements to the notification procedures for least-developed country Members, taking into account the experience regarding Secretariat produced reports that helped fulfill some of these requirements. In conducting its examination, the Sub-Committee shall seek the input of relevant WTO bodies, which may be in a position to advise on practical means for improving the notification procedures in relation to least-developed country Members, for example the possibility of longer timeframes, specified exemptions and simplified procedures for notifications, and cross-notifications. The Committee on Trade and Development shall forward the Sub-Committee's report to the General Council by 31 December 2003 for appropriate action.

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

Pursuant to Article 8.10 of the DSU, it was agreed that in disputes between a developing country Member and a developed country Member, at least one panellist shall be from a developing country Member, unless the developing country Member party to the dispute waives this right.

6. Agreement on Rules of Origin

In regard to preferential rules of origin under the Common Declaration in Annex II to the Agreement, the General Council agrees that in their arrangements for mutual reduction or elimination of tariff or non-tariff barriers, developing and least-developed country Members shall have the right to adopt preferential rules of origin designed to achieve trade policy objectives relating to their rapid economic development, particularly through generating regional trade.

Furthermore, the General Council shall instruct the Director-General to take action to facilitate the increased participation of developing and least-developed country Members in the activities of the Technical Committee on Rules of Origin of the World Customs Organisation as well as to coordinate with this organization in identifying technical and financial assistance needs of developing and least-developed country Members, and report to the Committee on Rules of Origin and the Council for Trade in Goods periodically, and the General Council as appropriate.

7. Decision on measures in favour of Least-Developed Members

As regards paragraph 2(v) of the Decision, it was agreed that the WTO through its participation in the Integrated Framework and JITAP [and other relevant institutions] will work to ensure that supply-side constraints of the LDCs are identified in the Diagnostic Trade Integration Studies (DTIS) and are addressed in the implementation and follow-up taking into account the specific circumstances of each beneficiary country. The General
Council shall also instructs the Sub-Committee of the LDCs to undertake a biennial review of the implementation of the DTIS and to monitor the possible impact of assistance that is targeted towards the diversification of exports from LDCs, including through comparing the composition and concentration of LDCs’ export structures over time and across LDCs and though the establishment of other relevant indicators.

8. Agreement On Agriculture

It was agreed that the General Council shall confirms as per Article 15.2 that least-developed country Members remain exempt from reduction commitments, as provided in Article 15.2, unless decided otherwise by consensus.


As per paragraph 8, the General Council shall mandate the Committee on Balance-of-Payments Restrictions to examine ways and means of simplifying the administrative requirements within the full consultation procedures.

The Monitoring Mechanism

There is a consensus among the Member and the General Council has agreed to establish a Monitoring Mechanism for special and differential treatment. The General Council has instructed the Special Session of the CTD to elaborate the functions, structure and terms of reference of such a Mechanism. There was convergence of views on some matters, such as the structure and possible role of the Mechanism and the sources of the information it should use to conduct its work. However, some important areas of difference of opinion, including the institutional structure of the Mechanism and the timing for its coming into force, remain.
VI. COMMENTS

The Doha Mandate on S&D treatment represents a significant achievement of developing countries, more so as it is the first time the issue of S&D treatment as such is included in the agenda of the multilateral trade negotiations. This positive element has been reflected in the proposals submitted for consideration at the WTO’s Special Session of Committee on Trade and Development (CTD) in an optimistic and enthusiastic approach of developing and least-developed country Members.

However, given the tenor of the ongoing talk on S&D treatment over the past year-and-a-half, one wonders whether the outcome would be even more elusive and illusory than in the previous Uruguay Round. Fifteen grilling months and three missed deadlines later, the Special Session of the CTD seems unable to bridge the gaps that remain between Members in the mandate to strengthen S&D treatment provisions. In particular, Members cannot agree on what to do with the 85-plus proposals on the table, nor on how to proceed with the Special Sessions work in 2003 and beyond. The most recent stalemate – where the General Council failed to adopt a CTD report requesting a clarification of the S&D treatment Mandate – demonstrates the extent to which Members diverge on these issues.

The primary difficulty lies in the different interpretations that Members ascribe to the mandate on S&D treatment. Developing country Members argue that operationalizing and strengthening S&D treatment provisions entail, making effective previous negotiations, thus requiring meaningful changes to the language in the WTO Agreements. Developed country Members feel that significant language change can only occur in the context of new negotiations. They do not consider the work of the Special Session to be a negotiation, and thus are unwilling to proceed with changes that would fundamentally alter the “balance of Members’ rights and obligations”.

Closely related to the interpretation of the mandate is the issue of the appropriate forum for reviewing S&D treatment provisions. Developed country Members, while pursuing their stand that the CTD is not a negotiating body, have responded to developing country Members proposals by suggesting that many of the agreement-specific proposals would be best dealt with outside the CTD (i.e., in the relevant WTO bodies, and other bodies that have a negotiating mandate). Developing country Members, on the other hand maintain that the Doha Mandate clearly provides all individual S&D treatment provisions must be reviewed and operationalised by the CTD first and foremost. They have responded negatively to requests to refer proposals to subsidiary bodies, citing a lack of resources to follow these issues in such a dispersed manner.

Differences also persist over the scope and sequence of the content of the S&D review. Developed country Members have argued that in order to provide a framework for the evaluation of the 85-plus proposals submitted to the STD, detailed discussion on the broader ‘principles and objectives’ of the S&D treatment must first occur. They
generally view S&D treatment as a means of integrating developing country Members into the multilateral trading system and hence insist that WTO must provide one set of rules for all its Members. While willing to consider some derogation for the LDCs, developed country Members have indicated that the outcome of the S&D review will be limited without some kind of criteria for differentiation and graduation (among developing country Members). The position of developing country Members on this issue is divided. While a group of these Members maintain that the reviewing of specific provisions on S&D is the only aspect of the Doha Mandate, and hence the current work programme should be restricted to such proposals. Yet others, like the African Group, recognised that “the principles and objectives of S&D treatment need to be clarified and written down to govern the adoption and operation of S&D treatment provisions”, but agree that the actual mandate must first be fulfilled.

The only proposal on which consensus was possible relates to the creation of a “Monitoring Mechanism”. Even here, what was initially viewed as a concession by developed country Members has now been entangled in divergent views over the nature of the mechanism. Developed Members have expressed their desire to establish the mechanism as early as possible (possibly in 2003) and also deftly sought to convert this Monitoring Mechanism as an active body monitoring the S&D treatment review process. Developing country Members, however, see the mechanism coming into effect after the finalization of a successful review of the Agreement-specific S&D treatment provisions. Developing country Members do not envisage the Monitoring Mechanism as an alternative to the Special Session of the CTD, but intend it to be a body for overseeing the effectiveness and utilization of S&D treatment provisions; monitoring compliance; and preparing recommendations on whether proposed Agreements to be adopted in the WTO framework comply with the rules on S&D treatment.

The open-ended and broad sweep of the Doha Mandate on S&D treatment – with no clear bench-marks or parameters – has now resulted in Members assuming rigid, entrenched positions that seem to be apparently irreconcilable. Note for example, the perception of Members on the objectives of S&D treatment provisions under WTO Agreements. Developing country Members emphasis on the role of S&D treatment towards incorporating the “development” dimension and the developed country Members stance that see of S&D treatment as a tool integrating lesser economies into the multilateral trade system, are presented as if they are mutually exclusive goals to be pursued.

Going beyond the language of the Mandate, the current impasse on the matter stems from the nature of the proposals and responses of Members. The proposals are a mix of both Agreement-specific proposals as well as one involving cross-cutting and systemic issues. Cross-cutting proposals by its very nature, be a long drawn-out process as it would require a wholesome analysis of a host of issues – legal, economic and preservation of rights and obligations under the WTO Agreements. It is therefore difficult to see how further progress can be made unless a consensus is reached or a list of priority issues to be considered immediately and another list of more fundamental S&D treatment issues that have to be addressed in a phased and evolving style.
In the view of the AALCO Secretariat, the developed country Members would have to play in good faith, a larger accommodative role towards the discharge of the Doha mandate on S&D treatment provisions. The disappointment over the failed expectations of the Uruguay Round has been a strong force that galvanised developing country Members to collectively lobby for the review of the S&D treatment provisions during the Doha Ministerial Conference. Consent by developing country Members for the launch of a new round of negotiations at Doha is implicitly based on the understanding that their concerns relating to S&D treatment, implementation issues, etc., are meaningfully addressed. An earnest attempt to resolve these matters would enhance the credibility and legitimacy of the multilateral trade regime.

From the developing country Members point of view, it is imperative that WTO should not be confined to S&D treatment tools like longer transition period and technical assistance. Concrete measures need to be taken to ensure provisions; place heavy emphasis on “supply-side measures” aimed at developing a competitive capacity at the national level; ensure coherence in global policymaking and implementation. In short, rather than asking what special treatment developing country Members should receive as they integrate into the world economy, the emphasis should be on what special rights to protect and special access benefit developing country Members should have for their growth and development needs.

The sustenance and growth of a rule-based system ultimately rests on the confidence and goodwill that Members repose on the system. In the context of the WTO, the Doha Mandate offers a window of opportunity to redress the past deficiencies of the system. Whether this opportunity would be seized to built upon a equitable and mutually beneficial functional regime depends on the extent to which Members are willing to recognise the legitimate interests of all other participants in that system.