SPECIAL AND DIFFERENTIAL TREATMENT IN INTERNATIONAL TRADE: A DEVELOPING COUNTRY PERSPECTIVE

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This article traces the policy of, and the history behind, "Special and Differential Treatment" (S&DT) accorded to the developing countries in the field of international trade. Within its broad canvas, the Article looks at the framework of GATT, the WTO, modern day Multilateral Agreements and recent political face-offs as exemplified in the Doha Negotiations. The Article argues that there has been a drastic change in the terms of S & DT and the attitude of developing countries. Ironically, this reveals a role reversal where developed countries have been de facto demanding for S&DT while it is the developing countries who are asserting the binding nature of international obligations.

I. INTRODUCTION

The international economic order that was established after World War II aimed at promoting free trade among nations. The doctrinal basis of this order was Keynesian Economics which emphasised government intervention to remedy hardships caused by the operation of market forces.[1] The notion of a self-correcting and self-operating equilibrium achieved by a balance of forces in a rational universe was decisively rejected by the new international economic order, which was put in

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[1] J.M. Keynes, THE THEORY OF MONEY AND THE FOREIGN EXCHANGES (1924).

place by the end of the 1940s.[2] This thinking was favourable to the aspirations of developing countries as well. Both, the reconstruction of European economies devastated by the War and the development of developing economies, had a place in the ideology of the international instruments.[3] Though these two issues were qualitatively different, the emphasis on productivity and employment was welcome to developing countries.

When the United Nations Organisation (UNO) launched the negotiations for the establishment of International Trade Organisation (ITO), a large number of developing countries actively participated in the negotiations, and the Havana Charter of 1948 articulated the idea of a partnership between developed and developing countries to achieve the integrated development of global economy.[4] This spirit was reflected in Article 8 which read:

> The Members recognise that the productive use of world's human and material resources is of concern to and will benefit all countries, and the industrial and general development of all countries, particularly of those in which resources are as yet relatively undeveloped, as well as the reconstruction of those whose economies have been devastated by war, will improve the opportunities for employment, enhance the productivity of labour, increase the demand for goods and services, contribute to economic balance, expand international trade and raise the levels of real income.

Though most of the provisions of the Charter were hortatory in nature, the document as a whole struck a balance between the concerns of developed and developing countries. The special concerns of developing countries, such as falling prices of primary commodities, were specifically addressed. But at the end of the

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[2] President Roosevelt initiated a series of New Economic Policies actively intervening in the market to fight the Great Depression in the 1930's. International Economic Institutions, established at the end of the Second World War such as the IMF and the GATT have carried forward that legacy to the international sphere.

[3] IBRD, popularly known as the World Bank, was conceived to fulfil the aims of both reconstruction and development. This is evident in its title itself – the International Bank for Reconstruction and Development. The Havana Charter also referred to these goals in several places.

[4] The United Nations Conference on Trade and Employment, held in Havana, Cuba, in 1947, adopted the Havana Charter for the International Trade Organization which was meant to establish a multilateral trade organization. For various reasons, the charter never came into force; *available at*, http://www.wto.org/english/docs_e/legal_e/havana_e.pdf (last visited 25 March 2008).

day, it was realised that the Havana Charter was "too good to be true".[5] It was unceremoniously jettisoned and only Chapter IV of the Charter, by name "Commercial Policy", was adopted with modifications. These modifications debilitated the spirit of partnership between developed and developing countries. The modified version came to be known as the General Agreement on Tariffs and Trade (GATT).[6]

The strategy of reciprocal trade liberalisation envisaged by the GATT was based on the idea of equality among nations,[7] and to that extent it failed to appreciate the economic vulnerability of developing countries. The result was that international trade liberalisation bypassed the goods which were of interest to developing countries.[8] Hence, developing countries became increasingly disenchanted with the concept of free trade embodied in the GATT and started demanding special and differential treatment (S&DT).

II. S&DT Treatment

Conceptually, S &DT can take the following four forms:

1. Coordinated measures between developed and developing countries which positively help the latter.

2. Exemptions for developing countries from a general rule so as to provide them with some autonomous policy space.

3. Imposition of comparatively lesser obligations on developing countries taking into account their relatively weaker position.

4. Provision of a relatively longer period of time to developing countries to comply with the general obligations.

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[5] For an elaborate treatment of the historical developments in this regard, see R. Gardner, Sterling – Dollar Diplomacy, 356-370 (1956).

[6] To bring the GATT into force quickly, a Protocol of Provisional Application was developed. The GATT 1947 Agreement was brought into the Uruguay Round agreements by GATT 1994; *available at* http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf (last visited 25 March 2008).

[7] "The GATT canonizes, canalizes and controls reciprocal trade liberalization" *See* J. Jackson , World Trade and the Law of GATT, 193-201 (1969).

[8] For the detailed analysis of the concept of inequality in international trade, see Gunnar Myrdal, Economic Theory and Underdeveloped Regions (1971).

The coordinated measures envisaged under (1) imply the transfer of resources from developed to developing countries. In the context of international trade, international commodity agreements and Generalized System of Preferences are examples of this coordinated approach. In the present state of international relations, where there is insufficient community spirit, it is very difficult to implement this type of measure. Article XVIII of the GATT, an example of the second type of special treatment, provides for a special regime for developing countries to manage their balance of payments problems and to promote industrialisation. The Agreement on Agriculture[9] and the Agreement on Subsidies and Countervailing Measures[10] forming part of the WTO Agreement are good examples for the third kind of special treatment; for they impose lesser obligation on developing countries. The Agreement on Trade-related Aspects of Intellectual Property Rights, permitting developing countries to avail a longer period of time to comply with the obligations under the agreement, illustrates the fourth type of special treatment.[11]

III. GATT AND S&DT TREATMENT

In the course of the evolution of the GATT, three significant measures were taken to give effect to the S&DT concept. They were, first, the amendment to Article XVIII of the GATT, secondly, the incorporation of Part IV and lastly, the adoption of the Enabling Clause in 1979.[12]

In 1957, Article XVIII of the GATT was amended to include Sections B, C and D.[13] The provisions of Section B allowed developing countries to apply quantitative restrictions more liberally than developed countries could, to meet their balance of payments problems. Section B provisions were liberally used by most of the developing countries and for all practical purposes these provisions exempted developing countries from free trade obligations during the GATT period. Sections C and D enabled developing countries to pursue infant industry protection policies.

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[9] *Available at,* www.wto.org/english/docs_e/legal_e/14-ag.pdf (last visited 25 March 2008)

[10] *Available at,* http://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm (last visited 25 March 2008).

[11] The TRIPS Agreement provides for transition periods, permitting developing countries additional time to bring national legislation and practices into conformity with TRIPS provisions; *available at* www.wto.org/english/tratop_e/trips_e/trips_e.htm (last visited 25 March 2008).

[12] *See* generally, Martin Wolf, *Differential and More Favorable Treatment of Developing Countries and the International Trading System* 1(4) WORLD BANK ECO. REV. 647 (1987).

[13] H. H. Liebhafsky, *Ten Years of GATT* 25(1) SOUTHERN ECONOMIC JOURNAL 74 (1958).

In 1966, Part IV, titled 'Trade and Development' was added to the GATT, and it contained three articles: XXXVI, XXXVII & XXXVIII.[14] Essentially, this was an effort to convert the various proposals canvassed in United Nations Conference on Trade and Development (UNCTAD) into hard law. But as it often happens in the case of international legal instruments, the long-winded sentences used camouflaged the absence of action with the actual appearance of action. The only definitive obligation which it contained was in Part IV, para.8 of Article XXXVI:

> The developed countries do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to trade of less developed contracting parties.

This Article clarified that the clause "do not expect reciprocity" meant that the less developed countries should not be expected to undertake obligations inconsistent with their individual development, financial and trade needs, taking into consideration past trade developments.

The principle of non-reciprocity adumbrated above paved the way for the Generalized System of Preferences (GSP).[15] This proposal for GSP was articulated in the UNCTAD-II held in 1968. In 1970 the U.S.A., the European Countries, Japan, and Canada agreed to give tariff preferences to certain products from developing countries.[16] To get over the legal hurdle of the most favoured nation treatment, the waiver under Article XXV: 5 was granted for ten years. But when this period of ten years was about to end, the Contracting Parties took a very important Decision, known as the Enabling Clause.[17] This provided for Differential and Most Favourable Treatment, Reciprocity and Fuller Participation of Developing countries, and a permanent basis for the granting of preferences in favour of developing countries.[18]

The above Decision was the third hard law measure under the GATT. As the title indicated, the Decision sought to provide more favourable treatment to developing countries to ensure their fuller participation in international trade. Para.1 of this Decision stated:

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[14] Note, *Free Trade and Preferential Tariffs: The Evolution of International Trade Regulation in GATT and UNCTAD*, 81(8) HARV. L. REV. 1806 (1968).

[15] John Whalley, *Non-Discriminatory Discrimination: Special and Differential Treatment Under the GATT for Developing Countries*, 100 ECO. J. 1318 (1990).

[16] Waiver Decision on the Generalized System of Preferences, June 25, 1971, GATT B.I.S.D. (18th Supp.) at 24 (1972).

[17] *See*, L. Bartels, *The WTO Enabling Clause and Positive Conditionality in the European Community's GSP Program*, 6 J. Int'l Econ. L. 507, 512 (2003).

[18] Decision on Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries, November 28, 1979 (L/4903) *available at* http://www.wto.org/english/docs_e/legal_e/enabling1979_e.htm (last visited 25 March 2008).

> Notwithstanding the provisions of Article 1 of the General Agreement, Contracting parties may accord differential and more favourable treatment to developing countries without according such treatment to other contracting parties.

Thereafter, the expression S&DT became firmly embedded in International Trade Law.

As pointed out above, preferences and international commodity agreements represent the coordinated approach towards S&DT. The UNCTAD led by its first Secretary General Raul Prebisch articulated these proposals powerfully. The GATT accepted the idea of preferences in principle, and quite a few international commodity agreements were concluded outside the GATT framework. Both the ideas, preferences and commodity agreements, continue to be in operation in diluted forms today. However, they have become so diluted that they hardly help the developing countries in solving their problems. According to a study commissioned by the International Labour Organization, between 1980 and 2000, the world prices for 18 commodities fell by an average of 25% in real terms. The structure and scope of international commodity agreements are too weak and too limited to do anything in this regard.[19] Preferences do not cover the items which are of interest to developing countries.[20]

Raul Prebisch and a British economist Prof. Singer demonstrated that terms of trade have been moving against developing countries, based on data collected in the period between 1870 and 1930. The Prebisch-Singer thesis, as it was popularly known, provided a theoretical framework for the policy of import substitution followed by most of the developing countries until the 1990s.[21] These countries focused on the mobilisation of internal resources through planned economic development. From an international institutional point of view, what these countries required was the freedom to pursue an autonomous policy of development while keeping external contacts alive. In other words, despite heavy internal orientation, most developing countries wanted to engage in international trade. The GATT framework as reflected in amended Article XVIII served this purpose.

The policy of planned economic development focusing on import substitution helped the developing countries in the initial stages to consolidate their political and economic independence.[22] But in the course of time, this policy proved to be

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[19] ILO, A FAIR GLOBALIZATION: CREATING OPPORTUNITIES FOR ALL 375 (2004).

[20] T.N. Srinivasan, *Emerging Issues in World Trading System*, in DEVELOPING COUNTRIES IN WORLD TRADING SYSTEM 32-38 (Edward Elgar ed., 2002).

[21] *See*, J.A OCAMPO, THE TERMS OF TRADE FOR COMMODITIES IN THE TWENTIETH CENTURY (2003).

[22] *See* generally Bela Balassa, *Trade Policy in Developing Countries*, 61 *THE AMERICAN ECONOMIC REVIEW* 178 (1971).

counterproductive. In the absence of competition, efficiency decreased, and in the absence of efficient production, equity became a mirage.[23] By the beginning of the 1980s, there was a general realisation that both, efficiency and equity, could be better realised in an open economy, guided by market considerations. Cutting across ideological and other barriers, many countries started adopting market-friendly policies both internally and externally; and it was in this context that the Uruguay Round negotiations were launched. The World Trade Organisation (WTO) was the product of neo-liberal economic philosophy widely prevalent in the 1980s and 1990s.

IV. Special and Differential Treatment Under the WTO

The Punta del Este Declaration provided that the developing countries would not be expected to make concessions inconsistent with their development, financial and trade needs. But when the agreement was reduced into writing, this assurance was confined only to least developed countries (LDCs) Article XI: 2 of the Framework Agreement that established the WTO, and two accompanying Decisions explicitly stated this point.

The WTO divides its members into 3 groups: developed, developing and the least developed countries. The position occupied by the developing countries under the GATT is now confined to the LDCs among them. In a couple of cases, e.g. the Agreement on Subsidies and Countervailing Measures (ASCM), even the LDCs are subjected to certain obligations.[24]

There are 97 places in the WTO Agreement wherein the S&DT is provided. They may be broadly grouped under five heads:

1. lower level of obligations;
2. more flexible implementation time table;
3. best endeavour commitments by developed countries;
4. technical assistance and training;
5. more favourable treatment for LDCs.

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[23] Anne O. Krueger, *Trade Policy as an Input to Development*, 70 The American Economic Review 288 (1980).

[24] The Agreement on Subsidies and Countervailing Measures ("SCM Agreement") addresses two separate but closely related topics: multilateral disciplines regulating the provision of subsidies, and the use of countervailing measures to offset injury caused by subsidized imports. *See*, http://www.wto.org/english/tratop_e/scm_e/subs_e.htm (last visited 25 March 2008).

The Agreement on Agriculture (AOA), the Agreement on Subsides and Countervailing Measures (ASCR) and the Agreement on Safeguards are three important agreements where the developing countries are subjected to lower level of obligations. Under the AOA, the developed countries are expected to reduce tariffs on agricultural commodities by 36% over a period of six years.[25] For the developing countries, the commitment is 24% over a period of ten years.[26] Similar principles are applicable to aggregate measures of support and export subsidies. Under the ASCM, there are special *de minimis* rules for imposing countervailing measures for subsidised imports from developing countries. Part VIII of the Agreement is titled 'Special and Differential Treatment' and provides for time periods and standards that are specific to developing countries. Both, under the Agreement on Safeguards and the Agreement on Anti-dumping, the action against a developing country cannot be initiated unless its overall share of imports exceeds particular limits.

The Agreement on Trade-related aspects of Intellectual Property Rights (TRIPS) is a very good example of the flexible implementation of commitments. It allows developing countries a transition period of five years to comply with obligations in the agreement, while developed countries have to comply with them within one year from the commencement of the Agreement.

In a number of places, Best Endeavour and Technical Assistance commitments by developed countries are provided.[27] The LDCs are by and large exempt from all the obligations. The ASCM is perhaps the one place where even the LDCs are subject to certain obligations, though they are much lower than the obligations imposed on developed and developing countries.

A comparison of S&DT in the WTO and the GATT shows a positive attitude of developing countries towards international economic relations. As was pointed out earlier, under the GATT regime, the developing countries used S&DT to look inward, and pursue their own closed-door policies. The drastic change in the attitude of

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[25] *See* generally Will Martins et al., eds., *The Uruguay Round and the Developing Economies*, World Bank Discussion Papers No. 307, 1995, at 128.

[26] *Id.*

[27] *See* for instance, Article 67 of the TRIPs Agreement – "Technical Cooperation: In order to facilitate the implementation of this Agreement, developed country Members shall provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favour of developing and least-developed country Members. Such cooperation shall include assistance in the preparation of laws and regulations on the protection and enforcement of intellectual property rights as well as on the prevention of their abuse, and shall include support regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters, including the training of personnel."

developing countries since the 1980s is reflected in the WTO as well. They now want to participate meaningfully in international commerce, and their demands are now couched in terms of level playing field. The new multilateral trade agreements (MTAs) such as the TRIPS, TRIMS, GATS, DSU etc, demonstrate this change in the perception. These agreements are equally applicable to all the countries (with the exception of LDCs) with some flexibility regarding the time factor.

V. Doha Development Round

Neo-liberalism reached its peak in the mid-1990s with the establishment of the WTO. Market-based reforms yielded some positive results initially. But soon the reform process both at national and international levels was faced with roadblocks. Within the WTO, it was reflected in the increasing disenchantment of developing countries with the WTO mechanism.

In the course of the negotiations in the Uruguay Round, the developed countries had used the liberalisation of trade in agricultural commodities and textiles as a bargaining tool to persuade developing countries to accept the obligations in new areas such as the TRIPs.[28] In practice however, the proposed benefits did not materialise, even though the developing countries were implementing the agreements in good faith and to the best of their ability. The Agreement on Textiles set back liberalisation such that the tangible benefits developing countries received were greatly delayed. In agriculture, the developed countries had been dragging their feet, even while fulfilling the obligations they had undertaken. Even today, powerful countries like the U.S.A. have not honoured the rulings of the WTO, especially in the area of subsidies.[29]

In the Ministerial meeting held at Doha in 2001, the developing countries voiced their frustration with the existing system and called for a new initiative to tackle the problems of development. It was noteworthy that the demands were no longer couched in terms of supplication. They were more in nature of assertions that the developed countries must comply with their obligations. Paragraph 2 of the Doha Declaration reads:

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[28] Amrita Narlikar, International Trade and Developing Countries: Bargaining Coalitions in the GATT and WTO (2003).

[29] *See* generally, *U.S. Non Compliance with WTO Rulings,* European Union Factsheet *available at* http://ec.europa.eu/external_relations/us/sum06_04/fact/wto.pdf (last visited 25 March 2008).

> The majority of WTO members are developing countries. We seek to place their needs and interests at the heart of the Work Programme adopted in the Declaration... In this context, enhanced market access, balanced rules and well-targeted and sustainably framed technical assistance and capacity building programmes have an important role to play.[30]

The Doha Declaration mandated that the negotiations had to conclude by 1 January, 2005 and the Ministerial meetings which took place in between had to take stock of the progress and give appropriate directions. But in reality, the deadline was missed several times and the deliberations are still continuing.

The AOA appears to be the most intractable issue dividing the developed and developing countries and even here the domestic subsides to farmers appears to be the bone of contention.[31] Surprisingly, in this highly charged controversy, the meaning of S&DT has totally changed, and developed countries are now demanding special treatment exempting them from the blatant violation of the rules which they had laid down after elaborate negotiations. As it is, the AOA was tilted in favour of developed countries since it exempts income support subsidies (resorted to by the western developed countries) while banning price support subsidies (used by the developing countries). Both the U.S.A. and the EC resort to box shifting, i.e., amber box subsidies are shown as either blue box or green box subsidies. When the developing countries point out that the huge subsidies, under whatever box they are provided, will distort international trade, the developed countries stonewall on the issue. As an illustration, the U.S.A. has not yet complied with the adverse WTO ruling in the Brazil- Upland Cotton case.[32]

It may be noted that historically when it came to agriculture, the richest countries received all the S&DT they demanded. In the 1950s, the U.S.A. sought a waiver from its obligations to liberalise agricultural trade and as a result, agriculture was pushed out of the GATT agenda. The same thing is recurring. With the expiry of the Peace Clause at the end of 2004, all subsidies including export subsidies are actionable under the Agreement on Subsidies and Countervailing Measures. From this point of view, the AOA is already dead. It would be best for the international trading system if this fact is acknowledged soon.

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[30] *Available at,* http://www.wto.org/English/thewto_e/minist_e/min01_e/mindecl_e.htm (last visited 25 March 2008).

[31] F. JAWARA, BEHIND THE SCENES AT THE WTO (2003).

[32] *See,* WTO Compliance Panel Report on Brazil's Complaint concerning US Subsidies on Upland Cotton; *available at,* http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds267_e.htm (last visited 25 March 2008).

Another interesting development pertaining to Doha Round is the Doha Declaration on the TRIPS Agreement and Public Health. The developing countries were reluctant to surrender their autonomy concerning the appropriate domestic IPR regime. Among other things, the neoliberal ideology finally led them to agree on the TRIPS. By 2000, they realised that tightening the IPR regime in developing countries would undermine their public health system. However, the solution was sought through the mechanism of IPRs. Paragraph 5(b) of the Doha Declaration read:

> Each member has the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted.
>
> Each member has the right to determine what constitutes a national emergency, it being understood that public health crises, including those relating to HIV/AIDs, tuberculosis, malaria and other epidemics, can represent a national emergency.

This is an assertion of the right to issue compulsory licences. It was suggested that the countries which do not have the capability to produce certain drugs internally may issue compulsory licences to an enterprise outside its jurisdiction to manufacture those drugs and supply them exclusively to the country concerned.

Though the Doha Declaration on Public Health created a certain uneasiness among the developed countries, the U.S.A. found it convenient when it was faced with the anthrax problem. Though cross licensing has not yet taken place, the Declaration has found widespread acceptance. Similarly there have been a number of other international issues concerning various MTAs. But the solution is sought within the framework of existing agreements.

VI. Conclusion

It is well-accepted in law and philosophy that the principle of equality can be applied only among equals. *A priori*, it follows that some special and favourable treatment should be extended to the relatively weaker sections of the society, nationally and internationally. This principle supplies the rationale for special and differential treatment (S&DT) for developing countries within the international arena. The international trade liberalisation movement cannot afford to ignore the interests of developing countries and their just demands. The acceptance of this principle in international trade however, has more to do with political reasons than any philosophical justifications. Most of the time, S&DT has enabled the developing countries to continue with their autonomy regarding policy space while enjoying the benefits of an open multilateral trading system. However, very rarely has there been S&DT in the sense of coordinated efforts to help developing countries positively.

In recent times with the ubiquity of the neo-liberalism *mantra*, and with the advent of the WTO, S&DT has lost much of its significance as far as developing countries are concerned. Ironically, in the case of the present impasse in the WTO, the roles seem to have been reversed. In a sense, it is the developed countries which have been demanding for S&DT on issues like AOA while the developing countries oppose this, using the language of international obligations. This represents not just a hypocritical stand by the developed countries, but also in a way symbolises the coming of age of the developing world.

A little scepticism is certainly in order when considering the huge differences, both socio-economic and political, that still must be surmounted. We will certainly lose substantial gains if trade negotiations were to fail. But we will also survive, hopefully stronger from the experience. Much still needs to be said in favour of 'free' trade; at the very least, it must however at least be 'fair'. The history of S&DTs and the various shades the issue has taken lends us a unique perspective to analyse and understand this trend.