LEARNING FROM DOHA: CAN ''DEVELOPMENT'' BE OPERATIONALIZED IN INTERNATIONAL ECONOMIC LAW?

This panel was convened at 9:00 a.m., Thursday, March 28, by its moderator, Matjaz Nahtigal of the University of Ljubljana, who introduced the panelists: Uche Ewelukaw of the University of Arkansas; Robert Howse of New York University School of Law; Andrew Mitchell of the University of Melbourne Law School; and Sanjay Reddy of Columbia University, Barnard College, and the School of International and Public Affairs.

Introductory Remarks by Matjaz Nahtigal*

Since the beginning of the Doha trade round, so many things in the international, economic, social, and legal environment have changed that it is questionable how—and to what extent—to remain faithful to the trade talks which started in a significantly different context. Not only has each new meeting of the Doha round led to shrinking gains for the majority of the developing countries, but also, since the beginning of the financial crisis, the leading industrial countries in the world have become more reserved about the future of trade liberalization.

This debate is anchored in the firm belief that the traditional conflict between free traders and protectionists should be replaced by a more promising debate about the existing global trade arrangement and any alternatives. Furthermore, such a debate on the future of the trade regime can be taken only in a broader context of redefinition of the entire Bretton Woods system, which was originally designed to establish international financial security, stability of exchange rates, flows of investments, and alleviation of poverty. At the moment, the debates on global monetary issues, currency issues, liquidity, and coordinated fiscal stimulus measures certainly come before global trade issues. The conceptual and practical issues within the Doha development round and beyond will return sooner rather than later.

The immense complexity of the trade talks with 150 highly diverse countries in terms of size, overall level of development, climate conditions, and social inequality does not necessarily mean that the members of the WTO cannot reach a new agreement. Such an agreement—if genuinely trying to address challenges of the developing countries—would have to be substantially different from the proposal which led to the suspension of talks in the summer of 2008.[1] Despite the initial optimistic promises of substantial gains and poverty alleviation throughout the developing countries, the deal on the table in Geneva would have increased the welfare of the poor countries only marginally.

This is not only a debate on how to strengthen development and productive capabilities of the developing countries; this is also a debate about how to achieve Pareto improvement of the international economic and legal framework, and on how to achieve a more diverse and more inclusive framework for developing and developed countries, where an increasing number of middle class people are also being placed under growing economic and social pressure.

Therefore, what would the genuine pro-development round require in order to live up to the initial Declaration in Doha? The recent surge of protectionism due to the global financial and economic crisis in most of the G-20 countries, as recorded by the World Bank, offers

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[1] This argument was put forward by Joseph Stiglitz and Andrew Charlton, Fair Trade for All (2005), p. 132.

us an interesting new perspective. Contrary to the WTO rules prohibiting direct subsidies, both the United States and the European Union are having to bail out not only their financial institutions, but also their automobile industries. The recent analysis by Ha-Joon Chang has shown that the huge rescue packages, which were explained as a part of the green initiative, are more likely to be examples of prohibited subsidies to their industries. The main reason why these subsidies are portrayed as green initiatives is not a sudden turn to the green (no matter how welcome and important this idea is), but primarily an attempt to legitimize government bailing out efforts in light of the existing WTO system. Ha-Joon Chang concluded that this action by the leading economies only confirms inherent contradictions and inequities in the current trading system. His conclusion is that rather than trying to cover this up by painting everything green, we should start rethinking how to truly reform the system so that not just rich countries but also the developing countries can use policies that are more suitable to their conditions.[2]

In strictly legal terms, the Special and Differential Treatment (S&DT) Principle was interpreted substantially more broadly before the Uruguay Round than after it. Despite many references to the S&DT Principle (for example, para. 44 of the Doha declaration), and the historical evidence from the developed and developing countries that the S&DT Principle can assist economic development, the present reading of the S&DT Principle leads to a very narrow interpretation with short-term objectives and anti-development effects.[3] More policy space, tools, and instruments are needed not only for the developing countries but also for the developed ones in order to be able to start building productive capacities in new technologies, energy efficiency, and other sectors.

If properly designed, the inclusion of labor and environment standards can benefit citizens of trading partners, both in the developing countries and in the developed countries. Sanjay Reddy and Christian Barry have shown that poorer countries can avoid a trade-off between enhancing labor standards and taking full advantage of job-creating production and trading opportunities if current international trade rules are reformed so that they reward, instead of punish, countries that improve labor standards.[4]

Finally, the further we move with alternative ideas about the future orientation of the trade regime, the closer we come to the topic which is missing on the table of trade talks. On the one hand, the movement of capital around the world is almost completely liberalized while, on the other hand, labor remains largely within home countries. More inclusive trade talks, together with labor standards protecting and empowering the labor force, both in developing and developed countries, should eventually lead to a discussion of how to combine mobility of both capital and labor around the world.[5] Faster diffusion of intellectual property and technologies should be taken into consideration.

Without the capability of addressing inequalities between developed and developing countries, as well as within countries, this may only exacerbate the current crisis. On the other hand, the ability of countries to find common grounds in the strengthened multilateral

[2] Ha-Joon Chang, *Painting Carmakers Green; Developed Nations are Trying to get Around WTO Subsidy Rules by Portraying their Industry Bail-outs as Green Initiatives,* THE GUARDIAN, *Feb. 3, 2009.*

[3] For a detailed analysis of this argument see Ajit Singh, *S&DT: The Multilateral Trading System and Economic Development in the Twenty First Century* in PUTTING DEVELOPMENT FIRST (Kevin Gallagher ed., 2005), esp. p. 252 and pp. 259-261.

[4] CHRISTIAN BARRY & SANJAY REDDY, INTERNATIONAL TRADE & LABOR STANDARDS 80-85 (2008).

[5] ROBERTO UNGER, FREE TRADE REIMAGINED 193-212 (2007).

framework may help all of them, acting primarily in their self-interest, to advance collectively in a more diverse, inclusive, and pluralistic global economy.[6]

THE "NEW" DEVELOPMENT AGENDA: CHALLENGES TO OPERATIONALIZING SPECIAL AND DIFFERENTIAL TREATMENT

By Dr. Uche Ewelukwa Ofodile[*]

I. INTRODUCTION

The world is witnessing the third wave of globalization. However, neither in the first wave (approximately 1870-1914), the second wave (approximately 1945-1980), nor in the third wave (approximately 1990-present) have developing countries ("DC"), particularly least developed countries ("LDC"), fully benefited or effectively participated in the global trading system. Rather, as Dowlah notes, "[m]ounting evidence suggests that the pace and magnitude of marginalization of the LDCs have been deepening in the rapidly globalizing world economy ... while unprecedented levels of benefits, stemming from economic globalization, are being accrued to the developed countries ... ."[1] Special and differential treatment (SDT) can and should be operationalized. However, operationalizing SDT requires expanding our vision of SDT and an honest acknowledgement that accepted wisdom about the efficiency of markets, the limited role for governments in economic and industrial planning, and the relationship between trade liberalization and development is somewhat flawed. It would also require a reversal or at least a revision of some of the damaging changes and rules introduced following the Uruguay Round ("UR") of trade talks. DCs are tired of empty promises of accommodation and aid for trade. The time to act is now. While it would appear that there is no incentive for developed countries to make SDT more effective, the credibility and legitimacy of the global trading system is squarely on the line. Moreover, a post-Doha Round system which fails to deliver economic welfare gains to DCs and which creates an even greater number of "left behinds" (individuals, groups, countries, as well as regions) may have serious implications for the security interest of leading industrialized countries. DCs must resist the pressure to strike yet another bargain that creates even greater asymmetry in costs and benefits. No bargain is better than a bad bargain and definitely less dangerous than a "grand bargain" that is based on speculation, empty promises, and mere conjecture.

II. SDT: LESSONS OF THE PAST FIVE DECADES

What lessons do we draw from the past fifty years? First, SDT provisions in trade agreements—even when mandatory—do not guarantee pro-development outcomes, nor do they necessarily vest DCs with any meaningful rights. Second, the UR marked a sad turning point in the history of SDT. Thanks to the UR, instead of qualitatively significant SDT measures, DCs got quantitatively more SDT provisions that were, however, devoid of content and were conceptually different from SDT measures of earlier years.[2] In place of non-reciprocity, DCs were coerced into making negotiation offers. Instead of policy space and

[6] Robert Howse, *Mainstreaming the Right to Development in International Trade Law and Policy at the World Trade Organization,* UN doc E/CN.4/Sub.2/2004/17, June 2004.

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[1] Caf Dowlah, BACKWATERS OF GLOBAL PROSPERITY 2 (2004).

[2] Going through the numerous WTO Agreements—the result of the Uruguay Round—there are at least some 155 SDT provisions which fall into six broad categories. See generally, WT/COMTD/W/77/Rev.1/Add.1, WT/COMTD/W/77/Rev.1/Add.2. WT/COMTD/W/77/Rev.1/Add.3, and WT/COMTD/W/77/Rev.1/Add.4.

much-needed flexibility, DCs received uniform SDT provisions, time extensions, and vague promises of financial assistance to aid compliance with new rules. Finally, in place of limited rules covering trade in goods, DCs were bombarded with expanded rules addressing new ''behind-the-border'' issues. Although agriculture and textile was brought under the GATT/WTO discipline, critical issues such as tariff peaks, tariff escalations, crippling subsidies, and devastating non-tariff barriers were not, and are yet to be, effectively addressed. Overall, ''[t]he Uruguay Round effected a ... shift in the paradigm for developing countries in trade law, from the development model of the Enabling Clause to a new adjustment model.''[3] The lesson, if any, from fifty years of ''trade and development'' experimentation is that trade is not an end in itself, that the benefits of trade are not automatic, that ready-made, one-size-fits-all approaches to SDT cannot work in a system made up of countries at vastly different stages of development and having different resource endowments, that governments have a role in economic planning, and that country-decision on appropriate process, degree, and sequencing of liberalization is critical.

III. The New Development Agenda

The new agenda, proclaimed in the Doha Declaration and the Doha Decision on Implementation-Related Issues and Concern (Implementation Decision), does not commit the WTO to any specific outcome. Member States agreed that the SDT provisions ''shall be reviewed with a view to strengthening them and making them more precise, effective and operational.'' Neither the Doha Declaration nor the Implementation Decision acknowledge the fundamental conflict over paradigms (flexibility approach versus time adjustment approach) in the structure and design of SDT measures or promise a paradigm shift; yet, as Frank Garcia notes, ''[t]he adjustment approach has proven to be inadequate because the extra time has not been enough, the extra help has not been forthcoming, and the playing field is not level.'' It is therefore not surprising that seven years into the negotiation, ''no clear mandate has emerged as to what specifically should or will be done to assist DCs''[4] and ''there is still no generally accepted framework or structure for undertaking this effort.''[5] The narrowing vision of SDT is a problem. Nevertheless, the Work Program does arguably leave some room for fundamental reform of SDT. The CTD is instructed not only to consider the SDT measures that should be made mandatory, but is also instructed to ''*examine additional ways in which special and differential treatment provisions can be made more effective*,'' and to ''consider ... *how [SDT] may be incorporated into the architecture of WTO rules*.'' A true development-oriented agenda calls for market access programs that are predictable, unconditional, and genuinely designed to benefit beneficiary (not donor) countries' interests. It also calls for SDT provisions that are not overshadowed and undermined by domestic policies in leading industrialized countries that are protectionist in design and damaging in their effect on poor countries. Going forward, several issues must be part of the discussion. Only a few are addressed here.

a. **Trade Theory:** The unfolding economic crisis—the apparent failure of markets and the return to protectionism and government intervention in economic life in leading industrialized countries—suggests the need to reexamine the neo-liberal economic theories that underpin

[3] Frank J. Garcia, *Beyond Special and Differential Treatment*, 27 B. C. Int'l & Comp. L. Rev. 291-317 (2004).

[4] Meredith Kolsky Lewis, *WTO Winners and Losers: The Trade and Development Disconnect*, 39 Geo. J. Int'l L. 165, 169 (2007).

[5] *Id.*

the global trading system and that have influenced the design of SDT to date. Empirical studies increasingly suggest that the consequences of rapid, unstructured import liberalization can be disastrous, and indicate that the relationship between trade-development is more complex than has hitherto been made out.

b. **Single-Undertaking and a Broadening and Deepening Agenda:** The broadened and broadening agenda of the multilateral trading system must be reconsidered. There is little indication that the expanded agenda ushered in by the UR has advanced the interest of DCs. Rules relating to subsidies, intellectual property protection, trade-related investment measures, trade in services, etc., must be reviewed for their effect on growth and development in DCs. The possibility of exemption from the single-undertaking obligation for DCs should also be on the table. Instead of revisiting single undertaking, suggestions have been made for more time extensions (including indefinite extensions) for DCs.[6] Although the extension rights approach affords much-needed policy space, it does not take into account the ''behind-the-scene'' pressures that frequently prevent DCs, particularly LDCs, from utilizing flexibilities provided in trade agreements (Article 31 of the TRIPS Agreement is a case in point.).

c. **Institutional Questions:** Does the WTO have the mandate and capacity to advance a true development agenda?[7] Is the mandate of the Committee on Trade and Development (CTD) too limited? Is the CTD equipped to handle any new responsibility that may result? With a view to integrating SDT into the architecture of WTO rules, there is a need for a body with a mandate comparable to that of the Council on TRIPS, the Council on Trade in Services, or the Council for Trade in Goods, and the ability to tackle complex and long-term development issues in a holistic fashion. Serious issues such as technology transfer and debt relief presently entrusted to working groups established in 2001 are better placed with a responsible body with adequate mandate, competence, and resources.

d. **Creeping SDT-Minus**: Attention must also turn to the trends towards ''SDT-minus'' in bilateral and regional trade negotiations, as these inevitably affect talks in Geneva and inadvertently modify the content and scope of multilateral SDT rules. While DCs call for more individualized SDT measures, the trend is towards an ever broadening (''WTO-plus'') liberalization agenda, single-undertaking, reciprocal commitments, lack of differentiation, and a one-size-fits-all SDT model focusing on a narrow set of objectives (time adjustments).

e. **Regulatory Questions – Enforcement, Differentiation, Graduation, Misuse**: Thus far, the development agenda has been advanced by means of a patchwork of provisions. Proposals for a Framework Agreement on Special and Differential Treatment (WT/GC/W/442) have been ignored. No covered agreement addresses development issues in a comprehensive fashion and there is no in-built reporting and review mechanism to ensure that commitments are respected and that flexibilities are utilized. Suggestions for a body with mandate comparable to the Trade Policy Review Mechanism make a lot of sense. Incorporating SDT into the architecture of WTO rules requires that the development agenda be placed on a sound legal framework, that a monitoring and review mechanism be put in place, and that enforceability issues be addressed.

The monitoring mechanism now created to implement Article 66.2 of the TRIPS Agreement (a provision dealing with technology transfer) offers insight into what is possible. Although

[6] *See, e.g.*, General Council, *Proposal for a Framework Agreement on Special and Differential Treatment*, WT/GC/W/442, ¶ 15 (Sept. 19. 2001); CTD, Communications from the EC, TN/CTD/W/13 (Aug. 1, 2002); CTD, *Joint Communication from the African Group in the WTO-Revision*, TN/CTN/W/3/Rev. 1, ¶¶ 23-24 (June 24, 2002). *See also* Garcia, *supra* note 3, at 307.

[7] Agreement Establishing the WTO, Article III.

a mandatory SDT provision, Article 66.2 was essentially ignored for years—prompting Members States to call on the TRIPS Council to ''put in place a mechanism for ensuring the monitoring and full implementation of the obligations in question.'' It was further agreed that the developed country shall ''submit ... detailed reports on the functioning in practice of the incentives provided to their enterprises for the transfer of technology ... '' and that ''[t]hese submissions shall be subject to a review in the TRIPS Council and information shall be updated by Members annually.''[8]

The Article 66.2 approach is far from perfect but it is a start. However, instead of a piecemeal monitoring system, what is needed is a comprehensive and unified reporting, monitoring, and reviewing mechanism with powers vested in a single body. Such a body can also be vested with the mandate to come up with a lasting solution to thorny issues such as DC differentiation, SDT graduation, under-utilization of SDT as well as misuse or over-utilization of SDT. In addressing these issues, such a body could also be vested with the rights to seek information from any relevant source, to consult experts, and to request an advisory report in writing from an expert review group (*see*, *e.g*., Dispute Settlement Understanding, Article 13).

f. **Rule of Law in the Global Trading System**: Do trade rules and policy prescriptions undermine the rule of law in domestic settings? Can trade rules be respected without the threat of litigation—threats that DCs often cannot afford to make? Progress on the development front requires that rule-of-law problems plaguing the global trading system be addressed. SDT provisions, whether mandatory or not, are useless absent a commitment to the rule of law by the WTO and by powerful members of the organization. Democratic deficits in the system must be addressed as well. Under the GATT, the Quad played the dominant role thanks to the Green Room process. Today, the Lamy Triangle is becoming an accepted aspect of the Doha Round negotiations. Common to the two is the exclusion of some developing countries and all LDCS from important decisions processes.

IV. Conclusion

With a worsening global economic crisis, trade prospects for DCs are bleak. In 2008, about half of the LDCs experienced de-industrialization of their economies. Most LDCs are seriously affected by the rise in commodity food prices, deteriorating terms of trade, and widening current account deficits.[9] It is predicted that the global economic down-turn will affect LDCs through lower commodity prices, weaker investment and trade flows, and higher exchange-rate vulnerability. DCs need markets for their products, a diversified export base and a lasting solution to their dependence on commodity exports, markets for manufactured goods, escape from burdensome trade rules, better terms of trade, and a lasting solution to price volatility. SDT provisions should aim to help DCs improve local productive capacity, eliminate dependency, create predictable markets for goods, and identify and eliminate burdensome trade rules. Expanded WTO membership should mean more diversified SDT. SDT provisions must reflect changes in development theories and the growing awareness that the benefits of trade rules are not automatic. They must address the claim by DCs that an expansionist trade liberalization agenda is detrimental to their interest and that a one-size-fits-all SDT is a recipe for disaster.

[8] Decision on Implementation, ¶ 11.2.

[9] *See generally*, The World Economic Situation and Prospects (2009) and Trade and Development Report (2008).

Improving the international trading system does require a new, comprehensive, and radically different regulatory framework.[10] However, DCs can improve their trade performance by engaging in unilateral reforms in a number of areas, including trade facilitation.[11] Most experts agree that trade liberalization and pro-growth development is as much about the international trading environment as about domestic reforms. It is also true that ''[c]ountries with inadequate trade infrastructure are less capable of benefiting from the opportunities of expanding global trade.''[12] Meaningful domestic reform can increase predictability and confidence in an economy and bring about an overall increase in the volume and value of trade.[13]

The WTO is not the only relevant institution in the multilateral trading system. Perhaps the time is ripe to review the mandate of the WTO vis-à-vis other institutions with a view to achieving a balanced mandate and policy coherence. Issues such as decline in the price of primary commodities, price volatility, persistence of old colonial division of labor, and continued integration of DCs into the global economy in inappropriate ways require the concerted action of multiple organizations.

Multilateralism and Diversity: Rethinking the Structure of WTO Agreements

By Robert Howse[*]

Despite the efforts of Director-General Lamy and his lieutenants to keep a brave face, a sense of frustration and failure clearly pervades the Doha round WTO negotiations. The round was born in Qatar, in the wake of two collapsed ministerial meetings (Seattle and Cancun). It has absorbed the energies of many capable and public-spirited officials and diplomats, and considerable resources of the WTO Secretariat, but has produced little in the way of results. The idea that it will all come together in some last minute high-pressure negotiating session, with enough pressure being put on the leaders of the major powers, is nothing but a fantasy. Political capital is invested elsewhere, dealing with the immediate demands of the financial and economic crisis—the restabilization of national economies and the normalization of domestic and international financial systems. While the Doha talks have stalled, preferential trade arrangements have proliferated. Even countries that had traditionally opted for multilateralism have now begun aggressively to pursue regional trade liberalization. While the Doha agenda remains dominated by issues left over from the Uruguay Round, the world has moved on and issues not on the Doha agenda (except indirectly and peripherally) such as the relation of climate change to trade have taken on a greater urgency and significance to many of those that are being discussed pursuant to the Doha Declaration.[1]

[10] *c/f.* Daniel Ikenson, *While Doha Sleeps: Securing Economic Growth through Trade Facilitation*, Cato Institute No. 37, June 17, 2008 (observing that ''Improving the international trading system does not require new, comprehensive multilateral agreement.'').

[11] *Id.*.

[12] *Id.*

[13] John Wilson, Catherine L. Mann, & Tsunehiro Otsuki, ''*Trade facilitation and Economic Development: Measuring the Impact*,'' World Bank Policy Research Working Paper no. 2988, Mar. 2003.

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[1] *See* Susan Esserman and Robert Howse, ''Rethinking the WTO,'' Forbes.com, Sept. 4, 2008. A number of the ideas that follow have been developed in my collaboration with Esserman; but I alone am responsible for the views expressed in this article.

But it is not only the subject matter of WTO negotiations that needs to be reconsidered; the structure of negotiations and of WTO agreements also needs to be rethought. In particular, we must reflect on the extent to which the current impasse is a product of what might be called the ‘‘Single Act’’ mentality: the notion that the WTO must move forward through comprehensive rounds of negotiations, resulting in a package of agreements to which all WTO Members must adhere on the same terms. Even in the Uruguay Round itself, this rigidity was not fully followed—the Government Procurement Agreement is plurilateral and the GATS permits individual WTO Members to tailor many of their obligations, based on what they are prepared to commit. Today, more than ever, the WTO membership exhibits enormous diversity in levels and trajectories of economic development, political systems, and capacities. In these circumstances, we need to re-imagine the round in more flexible terms.

First of all, why not simply admit that some elements of the Doha package are much harder to obtain agreement to than others? It is quite feasible to re-conceive the ‘‘conclusion’’ of the round as an on-going process, rather than a grand finale where everything is agreed upon at once. An assessment needs to be done of which areas are close to agreement and which areas represent a greater challenge to achieve common ground. Moving forward to agreement on the former, while simply admitting that the latter are not ripe, will give a sense of greater momentum on the one hand, and greater realism, on the other, to the Doha exercise. In defining these different areas, and taking stock of where things really stand, the Director-General with his senior counselors and officials, has the opportunity to exercise real leadership.

Second, a similarly hard-headed assessment needs to be done of whether in certain areas it is simply not realistic to expect all WTO Members to agree, or it might be the case that there is already a wide range of agreement among a considerable number of Members , but certain others are simply not ready to proceed (one possible example is liberalization of trade in environmental goods and services). In such cases, it may make sense to imagine a plurilateral outcome: an agreement among the Members who are ready to agree, while leaving it open for others to join. In reality, this is what happened with basic telecommunications and financial services in the Uruguay Round, although official WTO theology does not admit that these arrangements are genuinely plurilateral.

Third, a careful examination needs to be undertaken of the way in which various kinds of flexibilities can be built into new accords to address the needs and concerns of particular Members, whether for policy space or capacity building, for example. The existing flexibilities in WTO agreements needs to be inventoried and examined for their effectiveness in managing diversity within a multilateral framework. These include safeguards, exceptions and limitations provisions, phase-in periods, obligations to provide technical assistance, and so forth. In the heat of the negotiations themselves, there is little opportunity to consider carefully these structural possibilities, or to think about basic design choices: for instance, which flexibilities need to be offered on a general basis, and which can be tailored to particular Members or groups of Members?

Fourth, one dimension of the current negotiations that limits the range of options for achieving agreement is resistance among a number of key players, and supported by what appears to be the overall outlook of the WTO as an institution, to adjusting or amending the Uruguay Round Agreements—as if they were some kind of divine, or super-constitutional law set in stone. On the one hand, the Doha Round has been billed as a development round. On the other hand, it is not supposed to be possible to use this round to open up aspects of the Uruguay Round settlement that have been sources of considerable grievance and grief for a range of developing countries. The instruments on access to medicines are an illustration

that there is nothing actually impossible about adjusting the Uruguay Round bargain, where there is sufficient political will. Moreover, there are options in between a formal amendment of Uruguay Round provisions and complete inaction—for example, interpretative understandings, where the clauses in question are open-ended or ambiguous, or capable of more flexible readings than would seem to be currently the case. This could be used to fix some of the difficulties of the Dispute Settlement Understanding, particularly in the relationship between compliance panel actions and the imposition of countermeasures. It would even be possible to have interpretative understandings that would apply as between a sub-set of WTO Members, provided these do not diminish the rights of Members who do not subscribe to the Understanding in question. Such inter se agreements between some of the states parties to a multilateral accord are explicitly contemplated in the Vienna Convention on the Law of Treaties. Even if not in the form of treaties, understandings along such lines would constitute relevant practice to guide the Appellate Body in disputes to which adherents of the understandings in question are parties. If the legitimacy of the dispute settlement organs is not to be stretched to the limit, there must be some way of addressing gaps and ambiguities in the existing law other than through judicial activism or comprehensive renegotiation. Here, one immediate step would be to attempt to identify those issues and areas where more rapid and satisfying progress can be made through interpretative understandings or similar devices that fall short of formal legal amendments. Fixing some of the concerns about the existing law in this way could build confidence and momentum for new accords, and might be considered in some instances as an intermediate step.

None of these proposals will guarantee a successful Doha result, obviously; good timing and an appropriate investment of political capital both by developed and developing countries remain crucial. But in a world of enormous and increasing diversity, where new issues and challenges demand more rapid cooperation among states and other global actors, it is important to keep multilateralism alive and relevant. The tangled web of regional and other preferential accords already poses formidable challenges to global governance in areas such as investment, for instance. A more flexible WTO architecture can still draw on the Organization's strengths as an open forum for deliberation and exchange of ideas and views and a rule-of-law based system for settling disputes, with an elaborate jurisprudence and a final court of appeal.

Bind Rationale to Need: Operationalizing Special & Differential Treatment in the WTO

By Andrew D. Mitchell[*]

According to J. Michael Finger (formerly Lead Economist at the World Bank), special and differential treatment for developing countries *cannot* be operationalized in the sense of being made a formal, enforceable part of the World Trade Organization (WTO) rules.[1] In this regard, Finger endorses the 1987 work of Robert Hudec, *Developing Countries in the GATT Legal System,* and specifically his conclusion that the ''welfare obligation'' of developed countries to assist in the development of developing countries cannot be given legal force.[2] However, in my view, Hudec was not saying that GATT contracting parties could

[*] Associate Professor, Melbourne Law School. This presentation is based on Andrew Mitchell & Tania Voon, *Operationalizing Special and Differential Treatment: Game Over?* GLOBAL GOVERNANCE (2009) (forthcoming).

[1] J. Michael Finger, *Developing Countries in the WTO System*, 31 WORLD ECONOMY 887 (2008).

[2] ROBERT HUDEC, DEVELOPING COUNTRIES IN THE GATT 181, 187 (1987).

not agree on legally binding special and differential treatment provisions. Rather, he said that ''the welfare concept itself is incapable of being defined with the kind of specificity needed to establish a meaningful obligation of customary international law, applicable to the governments of all developed countries.''[3] Although this conclusion remains valid,[4] it does not preclude special and differential treatment from forming a workable and effective part of the rules negotiated among WTO Members. Hudec himself confirmed that developing countries may secure legal rights related to special and differential treatment and non-reciprocity in the form of contractual rights arising from negotiated liberalization.[5] These ''contractual rights'' are binding parts of public international law and enforceable within the WTO dispute settlement system.

Accepting that special and differential treatment can and should be operationalized, how can we go about it? Three key proposals by economic and legal scholars could be used to guide the process.

In the first proposal, Bernard Hoekman, Sector Director of the Trade Department in the Poverty Reduction and Economic Management Vice-Presidency of the World Bank, suggests that the WTO engage an independent body to mediate consultations regarding policy measures of developing countries that are allegedly contrary to WTO rules. These consultations would be a pre-condition to challenging these measures in the WTO dispute settlement system. The consultations would not focus purely on the consistency of the measure with WTO law. Rather, they would assess the rationale and development impact of the measure as well as negative spillovers on other Members, thereby assisting governments to achieve their objectives more efficiently.[6]

Hoekman recognizes that this approach may create concerns about the ''hollowing-out of the DSU,'' but he does not see this as a major impediment. This is a serious flaw with the proposal. Although WTO rules would still prevail in the adjudication of a dispute by a Panel, the proposed prior consultations would elevate economic analysis above WTO law in a way that discriminates against developing countries. Some might perceive this proposal as simply placing an additional barrier in the way of dispute settlement challenges to measures of developing country Members, to the benefit of those Members: if they can justify their measures on economic grounds, the dispute will not proceed. However, all Members have agreed to abide by the WTO rules, which do not always accord with economic efficiency. Why should only developing countries be forced to justify their measures on economic grounds first, before reaching the Panel stage? Developed countries are also frequently guilty of adopting economically inefficient measures, disguised or otherwise; it is patronizing to suggest that only developing countries need ''assistance'' in this regard.

The second proposal, by Professor Joel Trachtman of Tufts University, suggests ''a simple blanket exception'' so that developing country Members are not ''required to fulfil any commitment that is detrimental to their development or poverty alleviation,'' where this criterion is assessed by a team of professional development economists.[7] Like Hoekman's proposal, this relies on an independent body or team as well as economic analysis. However,

[3] *Id.* at 187.

[4] *See* Andrew Mitchell, *A Legal Principle of Special and Differential Treatment for WTO Disputes*, 5 World Trade Review 446 (2006) 469; Andrew Mitchell, Legal Principles in WTO Disputes (2008), ch. 7.

[5] Hudec, *supra* note 2, at 187–8.

[6] Bernard Hoekman, *Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment*, 8 J. Int'l Eco. L. 409, 416-7, 422 (2005).

[7] Joel Trachtman, *Ensuring a Development-friendly WTO*, 1 Bridges Monthly Rev. 18 (Feb. 2008).

it is not linked to the DSU and does not impose on developing countries the burden of justifying their measures on economic grounds separate from the usual dispute settlement system. Instead, it sounds more like an exception under Article XX of the GATT 1994 that a developing country could choose to rely on in a given dispute.

In theory, a ''blanket exception'' of this kind could significantly expand the scope of special and differential treatment for developing countries, in that it would be available for any WTO commitment rather than the existing limited commitments subject to special and differential treatment provisions. Given the existence of debate concerning the value of special and differential treatment to developing countries, and its economic basis, one might query whether an expansion of special and differential treatment goes beyond the operationalization that is called for. In practice, the focus of the exception on development economics may mean that special and differential treatment becomes more narrowly focused, to encompass only those measures that are justified on the basis of sound development policy. However, it seems unnecessary and resource-intensive to provide a blanket exception for all commitments that then needs to be narrowed by economic analysts, rather than making the rules or exceptions more precise or targeted in the first place.

A common theme of these two proposals is greater reliance on objective analysis of particular situations rather than an assumption that special and differential treatment is justified. ''Objective'' in this context means: (i) conducted by a neutral body separate from WTO Members, Panels and the Appellate Body; and (ii) on the basis of economic analysis to determine the relationship between a given measure or policy and specified development objectives. These two aspects of supposed objectivity give rise to two corresponding difficulties. First, any new body will raise complex problems regarding issues such as selection, impartiality, and independence. Second, ''economics'' and ''development economics'' are not necessarily any more certain than law. Individuals and teams of economists are likely to present conflicting views and models, making decisions by the relevant body contentious and subject to challenge.

It would be preferable to merge economics and law so that the economic criteria are agreed upon by the Members and written into the WTO rules. (Although this may seem self-evident, the current WTO agreements do not appear to reflect a consensus that all WTO rules should necessarily make economic sense, as reflected, for example, in the allowance of anti-dumping measures in the absence of competition criteria.) This is essentially what the third proposal, by Alexander Keck and Patrick Lowe (respectively Counsellor and Chief Economist at the WTO) suggests. They urge Members to engage in detailed analysis at the level of individual agreements, provisions, and countries. Each special and differential treatment provision should contain measurable economic criteria that a given country must meet if it wishes to obtain the relevant treatment.[8] This approach avoids arbitrary distinctions between countries that apply across the WTO agreements. It also ensures that criteria are linked to the rationale for special and differential treatment in the particular provision (that is, why special and differential treatment is needed here to facilitate development or trade liberalization) and prevents reliance on any ''independent'' body engaging in unspecified ''economic'' analysis. Although WTO Members will find it difficult to agree on the relevant criteria for each

[8] Alexander Keck and Patrick Low, *Special and Differential Treatment in the WTO: Why, When, and How? in* ECONOMIC DEVELOPMENT AND MULTILATERAL TRADE COOPERATION, 147, 175–6, 178–9, 182 (Simon Evenett & Bernard Hoekman eds., 2006).

provision,[9] this disagreement should be resolved in crafting the rules at the negotiation stage (once) rather than in applying them in subsequent disputes (potentially many times).

In operationalizing special and differential treatment, WTO Members must eschew the superficial attraction of independent bodies engaging in objective analysis to resolve individual disputes or issues in the future. Members must also refrain from repeating the mistakes of the past, simply agreeing to hollow words rather than meaningful distinctions. Members themselves need to agree on measurable criteria for granting special and differential treatment under specific WTO provisions (whether existing or new). This will require substantial economic analysis regarding trade liberalization and development in the context of individual provisions. It is a big task. However, Members have already achieved agreement on a number of issues involving special and differential treatment, and they are operating under a provision-specific framework rather than insisting on special and differential treatment as a political right divorced from their economic needs.

The World Trading System: Transcending the Economists

By Sanjay G. Reddy[*]

Economists have come to some incorrect conclusions on the possible and appropriate design of the international trading system and have also polluted the broader debate, diminishing the ability to think thoughtfully about institutional alternatives.

My recent co-authored book (with Christian Barry) on international trade and labor standards[1] is an effort to argue that an appropriate form of linkage between international trade and labor standards is in fact highly desirable from the standpoint of the developing countries, and in particular of workers and the less advantaged within them, contrary to the standard presumption.

The motivation for our joint investigation of this issue was in part a desire to prise open a prematurely closed debate. Some prominent economists in the debate have argued that those advocating linkage in the international trading system must be considered economic illiterates. On our reading, that is not the case at all. On the contrary, one can find a battery of arguments on behalf of linkage. Our ultimate case is not so much that there is a decisive case for a form of linkage, but that there is not a decisive case against it. At a minimum, respectable economic arguments can be brought to bear on either side. This is an issue that is therefore worthy of exploration. Such exploration must involve detailed institutional arguments, which in turn implies that various forms of judgment and expertise must be drawn upon. Economists must be involved but many others must be involved, too, including lawyers. Ultimately, the question of whether or not a particular kind of institution is desirable will have to be decided, in large part, on the basis of worldly judgments as to what is feasible in the current circumstance, and as to the balance of likelihoods as to how particular institutional designs are likely to operate in practice.

The debate on linkage offers a starting point for some broader observations about the role of economists and the role of lawyers, in institutional debates generally, and in those on the world trading system in particular. One of the claims that has been put forward in the debate

[9] WTO, World Trade Report 303 (2007).

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[1] Christian Barry & Sanjay Reddy, International Trade and Labor Standards: A Proposal for Linkage (2008).

is that there is a ''two birds'' principle which allegedly states that when you have two different birds then you need two different stones to hit them. If one does some investigation of the concept of the ''two birds'' as it appears in the English language, it appears that if there is any such principle it, in fact, has to do with the idea that you can sometimes use *one* stone to hit two birds. However, the advocates of the ''principle'' have argued that it demands the institutional separation of ''economic issues'' from non-economic issues in the international system, so that entirely different instruments can be used to address the two allegedly distinct kinds of issues. More specifically, they contend that the WTO is the appropriate space for addressing economic issues, especially commercial policy issues, and that the ILO and other international organizations which have traditionally been concerned with supposedly non-economic issues should be given responsibility for addressing the latter. More forcefully, they appear to contend that this institutional arrangement provides the uniquely efficient allocation of rights and responsibilities in the international system.

The principle that multiple targets require at least as many instruments as there are targets was most notably expressed in the economic literature by Jan Tinbergen, the Nobel prize-winning Dutch economist who wrote on this issue in the 1950s in his work on the economics of international cooperation. However, it turns out that Tinbergen himself was very sensitive to the possibility that the different instruments which were needed to address different targets might have to be wielded in a coordinated way in order to be effectively and appropriately employed, and that whether or not distinct instruments should be vested in distinct *institutions* with separate decision-making power was not something that could be directly determined on the basis of formal logic. Rather, this could only be established on the basis of worldly and pragmatic reasoning as to how different institutional designs were likely to succeed *in practice* in effectively promoting the pursuit of the distinct targets, through the norms and incentives these designs establish, in turn influencing the individual and joint application of the instruments.

We may ask a broader question: is the supposed distinction between the economic sphere and the non-economic sphere, which is made frequently in debates on the international trading system, a sound one? It appears that many economists in the debate think of the economic sphere as defined by the circulation of goods and services; however, that is not actually the definition of the economic sphere which prevails in mainstream economics. Indeed, in mainstream economics education today, abstract concepts such as the utility function and the production function reign. One is informed that it is possible to make ''everything'' an argument or an output of one of these functions and that this versatility is a reason that economics should be judged to have powerful tools. From this standpoint, contemporary mainstream economics presents a way of looking at the world in which the domain in which agents maximize is itself maximal. This vision of maximal maximization does not ultimately permit any distinction whatsoever between the economic sphere and the non-economic sphere and this non-distinction is a subject of disciplinary celebration.

So what is the distinction that the international trade economists appear to be making? That is very hard to answer if one rejects the idea that a fetish for goods and services can provide a sufficient basis for defining the economic. One way to think about the economic sphere which would broaden it substantially from the way in which some of the international trade economists have been thinking about this issue would be to think of it, at least as it pertains to the international trading system, as having to do not just with the circulation of goods and services but with all those things that are *affected by* the circulation of goods and services. Of course, as soon as a broader understanding of the economic sphere is accepted

it becomes feasible and necessary to introduce a range of additional concerns into the heretofore narrow discussion of ''economic'' issues.

It is well known that the original plan for the Bretton Woods system included the formation of an International Trade Organization, or ITO, the mandate of which was to include a concern with employment issues, going beyond trade issues narrowly considered. If one were to look today at what kinds of concerns would be appropriate to bring into the economic sphere, understood in the broader sense just defined, there are many more issues that would come to mind. Labor standards concerns are among those because it is undeniable—as many have rightly pointed out (see in particular the work of Kyle Bagwell, Robert Staiger and Petros Mavroidis)—that in the WTO system as it currently stands, because there are ceilings on tariffs but no floors on labor and environmental standards, there are powerful pressures for the lowering of labor and environmental standards in order to generate competitive advantage for domestic firms. From this standpoint, labor standards concerns and environmental concerns would certainly appear to fall under the ambit of economic concerns.

Of course, one could adopt an even broader conception of the economic domain as including not only those things which are already affected by trade in goods and services, but those things which are *potentially* affected by the rules governing the circulation of goods and services. This is a broader idea because it encompasses all of those spheres which could potentially be linked to trade, for example, to take advantage of the enforcement power provided by the world trading system. It is often pointed out that countries have powerful incentives to join the World Trade Organization because of the ''single undertaking'' in the system: they have to accept a wide variety of provisions if they want the big prize, which is access to the world trading system under secure criteria of mutual market access. However, this also generates a potentially powerful enforcement mechanism which could be used to bring about compliance with international treaties concerning other issues. Whether this would constitute an inappropriate imposition of enforcement power from trade or whether it would be an appropriate method for countries collectively to put in place incentives to ensure higher compliance with international treaties—especially those which may be desirable but difficult to implement in the presence of commitment or coordination problems—is an issue to be discussed, drawing on all of the normative, legal, political, and economic reasoning which is required. In this debate, the knowledge of economists is a valuable resource, but wholly insufficient.