

BALANCING RIGHTS AND OBLIGATIONS IN THE WTO – A Shared Responsibility

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Executive Summary

The near-paralysis of the negotiating function of the WTO has placed an unprecedented strain on the trading system that threatens to be more than just a lull in activity. The current inertia is driven not only by ailments intrinsic to arrangements in need of overhaul. The challenges facing the multilateral trading system are also symptomatic of rapid change and disruption in a broader global economic and socio-political context.

This confluence of challenges has led a growing number of governments and other stakeholders to call for reform of the WTO. The seriousness with which reform efforts are undertaken will be key in determining whether the WTO reasserts the historic centrality of its global role in managing international trade relations in the years ahead.

A failure to tackle impediments to smooth and mutually beneficial trading arrangements among nations will undermine and ultimately reverse the extraordinary economic, social and political gains that have accumulated to countries through trade since the beginning of the second half of the twentieth century. Remedying today's increasingly disruptive trade relations requires adaptation to new realities, as well as action to secure the sometimes neglected imperative of inclusiveness.

The gains from trade must be shared to ensure progress and nurture development. That is a responsibility to be owned by the entire trading community. An inward-looking repudiation of the well understood economic gains from specialization will inevitably result in shrinking opportunity, lower incomes and growth, and significant risks of heightened conflict.

An additional point of considerable importance is that trade policy cannot stand alone as the instrument of effective development. Trade policy is but one of many elements that determine the economic fortunes of countries. Policy coherence and good governance are fundamental pre-requisites of progress. These considerations weigh on all countries, not just developing ones.

The aspirations of this paper are not so all-encompassing. We do seek, however, to address one of the most prominent challenges confronting the trading system – a challenge that is by no means of recent vintage. It is embedded in the very foundations of the post-second world war international trade architecture. Its origins are in competing perceptions of what constitutes an appropriate balance of rights and obligations among a highly diverse membership with different needs, priorities and aspirations in trade relations.

The debate around this issue is often referred to in terms of special and differential treatment (S&D)². The S&D issue has frequently slowed and sometimes arrested progress in pursuing the GATT/WTO's core objectives. This state of affairs can only be remedied if it is treated as a shared responsibility of all members, and not as a matter of 'them' and 'us'.

Over the years, S&D has become more of a political football than a productive approach to development in the WTO. It is conceded with increasing reluctance on one side and clung to as an article of faith by the other. It was part of a trade-off that does not make sense anymore, if it ever did. Yet S&D – properly conceptualized and designed – can play a constructive role in promoting both the progress of the multilateral trading system and of developing countries within it. The key, as we argue in this paper, is to find a new bargain, one based on ambition and shared responsibility. Fresh thinking about what

2. The expression entered the GATT/WTO lexicon through a 1979 GATT Decision on Special and More Differential Treatment, Reciprocity and Fuller Participation of Developing Countries, although the underlying notion of S&D was embodied in the GATT from its earlier years.

differentiation should really mean in the WTO should be part of that bargain. This would help to bring WTO members together, replacing old habits of binary thinking that divide them.

This paper addresses the challenges of balancing S&D not just in terms of adequate design but also of effective access to S&D perceived as legitimate among members. We use the terms 'S&D', 'developed' and 'developing' for convenience, and not as precise definitional categories. In fact, the purpose here is to dissect these notions, assess their worth and propose ways forward. The paper attempts to clarify different approaches to S&D, including the question as to where S&D is needed to nurture developing country participation in the system and protect developing country interests. In what follows, arrangements that facilitate developing country participation in the WTO may not always be referred to as S&D³ or may not even involve explicit differentiation.

In teasing out lessons from the past and identifying promising avenues for rethinking S&D in light of varied approaches adopted in different agreements, the paper has focused on specific areas rather than tackling the whole waterfront of S&D deployment. These areas include tariffs and non-tariff measures in the sphere of goods, the special case of agriculture, the General Agreement on Trade in Services (GATS), the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, and the Trade Facilitation Agreement.

Many of the problems confronting the S&D debate originate in the area of merchandise trade. They are rooted in GATT history and have persisted. Developed countries offered unilateral tariff preferences on some products of export interest to developing countries instead of contract-bound most-favoured-nation (MFN) tariffs. In exchange, developing countries were 'obligation-lite' in terms of their own binding market access commitments, consistent with the principle of non-reciprocity. We have referred to this as a minimalist bargain. It started to fall apart in the 1970s as expanding developing country markets became more attractive to developed countries and many developing countries began to take greater interest in secure access to export markets.

We argue that the opportunity exists for mutually advantageous bargains through progressive negotiations leading to contractually bound results in market access for goods in merchandise trade and services. Tradeoffs would be easier to secure if such negotiations were broadened to include an agenda that offers something to all members and the opportunity to secure mutually beneficial exchanges. On the goods side, non-contractual preferences would disappear over time, with possible support measures for the most vulnerable developing countries in the face of shrinking preference margins.

Much of the difficulty in shaping the content of S&D has arisen from reliance on a binary distinction between developed and developing countries which up to now has operated on the basis of self-selection at the country level. Not all developing countries are able, or have chosen to, access S&D in a uniform fashion. We argue that it would be impractical to try to negotiate the development status of countries. A better approach is to design S&D in terms of specific individual country needs at the sectoral or activity level.

The GATS emphasizes progressive market opening for all at a pace that corresponds to the capacity, interests and priorities of individual members. This applies to all members and not only developing countries. The

3. Neither the GATS nor the TRIPS Agreement, for example, make any mention of S&D.

idea that GATS negotiations can take place in bilateral, plurilateral and multilateral configurations has also added an element of flexibility.

Where specific provisions relating to developing countries are included in the GATS, the emphasis is consistently on enabling beneficiaries to participate more fully in services trade rather than being exempted from obligations. Higher levels of regulatory obligations are linked in certain areas to the assumption of specific commitments, encouraging developing countries secure their own policy choices regarding the pace and sequence of market opening rather than defending their 'policy space' by not undertaking new commitments.

The emphasis on fuller participation rather than exemptions makes technical assistance and capacity building support a key enabling component of fuller engagement. We examine some areas where this is the case, including the Technical Barriers to Trade (TBT) Agreement, the Application of Sanitary and Phytosanitary Measures (SPS) Agreement, GATS, TRIPS and the TFA. The TFA takes a novel approach by designating responsibility to the recipient of S&D to determine the technical assistance requirements and associated time frame for compliance. The paper argues that giving and receiving technical assistance is in the shared interest of the entire membership.

We also believe that a flexible approach to initiating and carrying out negotiations will support S&D without putting differentiation issues front and centre. In addition, we consider that S&D issues would be less contentious and better managed if the membership devoted more attention to the deliberative functions of the WTO. Another key requirement for effective S&D is that obligations relating to consultations and notifications in support of transparency are more fully respected than is the case today.

Introduction

The credibility and effectiveness of the WTO is being compromised to a degree unprecedented since the establishment of the multilateral trading system seventy years ago. The pressures on the system emanate from multiple sources and are not just about trade. They are fueled by disenchantment with the domestic distributional consequences of economic change, geopolitical shifts in economic heft and political power, and perceived imbalances in institutional arrangements for cooperation at the global level.

While the multilateral trading system is affected by these forces, it also has its own issues to contend with. The negotiating function of the WTO has performed poorly in recent years, placing a strain on the institution's other functions as well, including dispute settlement. A growing proclivity among some members to set the rules aside is a further manifestation of systemic malaise in need of urgent attention.

One underlying challenge to the effectiveness of the trading system that predates the present crisis, however, is the relentless struggle to agree upon and maintain an appropriate balance of rights and obligations among members. The absence of shared perceptions of what represents balance has compromised the ability of members to find common ground and contributed to a sense of institutional

stasis. This source of disagreement has inevitably spilled over into multiple aspects of the WTO's work and slowed progress on agenda-setting and negotiations. The challenge has become more acute as GATT/WTO membership has grown over the years in number and diversity, resulting in a more complex range of priorities among members.

This paper takes stock of some 70 years of accumulated institutional effort to manage economic diversity. It examines the different elements of what has come to be referred to generically as special and differential treatment (S&D). The original context of the differentiation debate, which was concerned with market access and regulation of merchandise trade under the GATT, has to a degree shaped the current situation. We shall review some of this history in order to consider lessons that may be learned.

We shall also consider how alternative approaches have emerged in relation to S&D. The term S&D is convenient but not always accurate. Neither the General Agreement on Trade in Services (GATS) nor the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), for example, contain the phrase 'Special and Differential Treatment' in development-related texts. The approaches adopted there embody important differences from what was engineered over the years in the GATT context. Much of this paper is focused on the relative merits of alternative approaches to differentiated treatment. We also argue that well designed provisions and procedures sometimes obviate altogether the need for differentiated treatment.

The paper also refers frequently to developed and developing countries. This is purely a matter of linguistic convenience. It is not intended to imply endorsement of any particular designation of members, nor to suggest that this binary distinction is in any way helpful. On the contrary, we argue that it has been at the heart of much of the difficulty.

Moreover, we have not focused specifically on the one category of countries that is formally defined – the least-developed countries (LDCs). This is not intended to imply a lack of concern for the challenges facing the lowest income countries in the trading system. As shall become clear in the paper, it is rather because the uniquely defined place reserved for these countries in GATT/WTO trade arrangements does not in our view raise any systemic challenge. Rather, this UN-designed LDC architecture adopted by the GATT/WTO in 1979, with its self-executing technical criteria for designating LDC status, reduces some of the challenges encountered in dealing with development issues writ large.

We attempt to formulate suggestions and proposals that are sufficiently incremental to avoid the charge that they are based on unrealistic abstractions and wishful thinking. Changes to existing WTO rules are not called for in anything proposed here. Members would use existing tools to initiate, conduct and conclude long needed negotiations.

A paper of this nature does not pretend to prescribe particular outcomes for specific issues. Rather, it seeks to set out possible pathways to a better balance of rights and obligations. We also recognize that reorienting long-held positions towards practical and equitable mutual accommodation is a process that takes time. The first step is a willingness to engage in a focused quest for shared gains, moving on from today's inertia.

The paper is divided into four sections. Section II briefly reviews the history of the S&D issue and seeks to highlight some of the context and approaches that shaped later debates, which in some measure have brought us to what can accurately be described as today's deadlock. Section III analyzes some lessons we can learn from various ways in which S&D provisions have been framed and implemented. Section IV contains conclusions and recommendations.

A Brief Background to Differentiation in the GATT/WTO

This section focuses predominantly on GATT and trade in goods, relating to the pre-WTO period before the entry into force of the GATS and TRIPS Agreements. As we shall see in Section III, both of these agreements brought innovations to the way differentiation has been managed.

Early post-Second World War efforts to create a regime for international trade led to the International Trade Organization (ITO), completed in 1948. For a variety of reasons, the ITO was stillborn. In parallel with the ITO negotiations, however, several governments had been working on tariff reductions that were to be folded into the ITO. With prospects for the ITO's adoption looking bleak, governments were determined not to throw away the progress they had made in tariffs. As a result, the so-called interim agreement – the General Agreement on Tariffs and Trade (GATT) – was established in 1948.

The GATT was signed by 23 countries, a mixture of high-income and lower-income countries – today referred to as developed and developing countries. The preparatory work on tariffs, however, had been undertaken by a group of eight developed countries (the United States, the United Kingdom, Canada, Australia, France, Belgium, the Netherlands, and Luxembourg) who were amongst the original GATT signatories.

Over time, the GATT became the trade arm of post-war international economic governance. It was the third leg of the Bretton Woods architecture, which had created the International Monetary Fund and the International Bank for Reconstruction and Development (World Bank). The GATT was built upon progressively and eventually became the World Trade Organization (WTO) in 1995. In its pre-WTO days, GATT membership grew to 127 countries, largely through the addition of developing countries. Since the establishment of the WTO, a further 37 countries have joined, making the current WTO membership 164 in total.

The core objectives of post-Second World War Bretton Woods system were to ensure monetary coherence internationally, to undo the economic nationalism and protectionism that had defined the 1930s, and to reconstruct war-torn Europe. Economic development in low-income countries was not a central concern. Colonialism cloaked developmental realities and needs. As the development imperative moved towards centre-stage over the years, thinking had to change and institutions adapt. This study is about how the multilateral trading system, represented by the GATT and then the WTO, has attempted to manage these exigencies.

As well as trying to absorb the challenges of development, the trading system had to adjust to an increasingly integrated and complex international economy. Deeper trade disciplines and the introduction of new areas of competence within the multilateral trading system continued apace from the 1970s onwards. The Uruguay Round (1986-1993) resulted in the creation of the WTO, as well as the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Intellectual Property Rights (TRIPS). A fuller account of the evolution of the trading system is presented in a chronology appended to the paper (Appendix 1).

THE COMBINATION OF MFN AND RECIPROCITY IS ILL-SUITED TO TRADE LIBERALIZATION NEGOTIATIONS BETWEEN LARGE AND SMALL COUNTRIES

The GATT's early trade liberalization efforts were based on two important principles – MFN and reciprocity⁴. It is easy to understand the MFN principle (notwithstanding specified exceptions for preferential integration and development). For an institution with global aspirations non-discrimination makes sense. As for reciprocity, this too had a strong logical basis at the time it was introduced. The countries liberalizing trade at the outset were the large ones listed above. Because of their size, they were able to affect the terms of trade, which meant that if they liberalized unilaterally they would suffer an avoidable loss in income⁵. The path to avoidance was to insist on reciprocal action by trading partners, thus more or less neutralizing adverse terms of trade effects for individual countries.

The implication of this in practice is that by insisting on reciprocity in exchange for trade liberalization measures in an MFN world, large countries would be reluctant to engage in bilateral exchanges with smaller ones. This is simply because small countries cannot offer adequate liberalizing reciprocity to large ones, and the latter fear that such bargains would allow their larger trading partners to free ride on unreciprocated market-opening benefits. Absent some kind of tariff reduction formula, developing countries are largely cut out of bilateral exchanges in multilateral trade liberalization efforts, assuming they want to participate (which of course may not be the case). Formula approaches to tariff reduction negotiations have not been very successful to date, reflecting in part the temptation to exclude sensitive products and thus undermine the balance of the deal.

It is noteworthy in this context that with the exception of the accession negotiations of individual members and the 1997 and 2015 Information Technology Agreements (ITA1 and ITA2), few developing countries have lowered applied most-favoured-nation (MFN) tariffs on the altar of a GATT/WTO negotiation. They have mostly maintained gaps between bound and applied tariffs. If they have contributed to tariff reductions in trade rounds, these have mostly served to lessen the gap rather than directly change the conditions of market access. Bindings above applied rates can nevertheless be helpful if they constrain countries from raising applied tariffs in future without restraint. Many developing countries have, however, opened their markets over time, either unilaterally or through preferential trade agreements (PTAs) – just much less so in the GATT/WTO.

The relative degree of market opening agreed to by different parties in the GATT/WTO has been a major source of contention. Developed countries have retained high MFN tariffs in agriculture, textiles and clothing and some other labour-intensive manufactures. Various other countries have kept these (and other) MFN tariff levels high as well. Some of the reasons for modest progress on trade liberalization, other than the dampening effect of the MFN-reciprocity nexus, are discussed immediately below. We shall argue in due course that a basis exists for a bargain.

HABERLER, PREBISCH-SINGER AND APPROACHES TO TRADE AND DEVELOPMENT IN THE GATT

Structural differences in the economies of developed and developing countries were a further impediment to a shared trade liberalization agenda. Developing countries were naturally interested in market opening on the part of their major trading partners that focused on the products representing their major sources of export earnings. These were agricultural products, including in

4. The term 'reciprocity' in this context refers to the notion of overall balance in rights and obligations and not sectoral reciprocity, which has emerged as an issue in recent years.

5. A country acting alone to lower tariffs that is large enough to affect prices would create additional domestic demand for the product in question. This would raise world prices, making imports more expensive, and resulting in less foreign exchange earning power in relation to exports – hence an income loss for the country.

their processed forms, as well as labour-intensive manufactures more generally.

Developed countries, on the other hand, faced a number of socio-political and distributive constraints when it came to opening these markets to foreign competition. The benefits lost from not opening were manageable because these sectors represented very modest shares of developed country economic activity. In short, there were no politically effective domestic lobbies in developed countries pushing for market opening in these areas.

Discussions regarding the absence of market access opportunities for developing countries led to the commissioning of a report from a panel of experts led by the renowned Harvard economist, Gottfried Haberler. The Haberler Report (1958) went a long way in vindicating developing country complaints on this matter.

At the same time, the 1950 writings of Raul Prebisch and Hans Singer were influential in arguing that development required the diversification of developing country exports away from primary production. This was because the demand for these products fell in relative terms as incomes rose. In economists' jargon, the secular terms of trade would inevitably move against traditional developing country exports. The only escape from this was through diversification of the production base towards manufactured products. That process of diversification, recommended in the Prebisch-Singer thesis, made an argument for import substitution. This would allow the development of local manufacturing on the back of domestic demand for the substituted production.

The Haberler and Prebisch-Singer analyses were quite differently focused, with Haberler emphasizing market access for exports and Prebisch-Singer championing domestic markets protected from import competition. They were not comfortable bedfellows. Nevertheless, between them they arguably created a situation that led to what in retrospect could be characterized as a 'minimalist bargain' between developed and developing countries.

The development debate around trade in the late 1950s and 1960s pressured developed countries into taking action. Instead of going for contract-based MFN trade opening, they established voluntary non-contractual preference schemes to open their markets unilaterally to developing countries. These were neither stable, universally offered, nor in some cases unconditional with respect to non-trade issues. At the same time, the import substitution option favoured by developing countries implied limited engagement in contractual trade-opening commitments on their part.

The 'minimalist bargain' amounted to limited contractual market access commitments from rich countries on products that mattered most to developing countries in exchange for limited or non-existent market access commitments (tariff bindings) from many poorer countries. Developed countries were not unduly exercised about market access in developing countries because their markets were still small. This is why the exchange of attenuated market opening from rich countries for little or no contractual commitment from poorer ones made the low road in trade relations a viable outcome.

This more or less implicit arrangement paid scant attention to the core objective of fostering gains from trade through international cooperation. It was not a stable equilibrium, but rather a fix of the moment. It created the equivalent of a trade class system and made it very difficult for countries with little or no accountability in the trading system to have a voice. But this lazy equilibrium would inevitably be destabilized with an exploding GATT/WTO membership and the growing economic weight of some developing countries. This inevitability was at the core of escalating tension about rights and obligations in the GATT/WTO.

NO COMPREHENSIVE DEFINITION OF DEVELOPING COUNTRIES EXISTS NOR ANY CRITERIA FOR DISTINGUISHING AMONG THOSE THAT CLAIM IT

In the back-and-forth debates of the 1950s and 1960s about developed-developing country relationships, no agreed criteria were established for defining developing country status in the GATT. Criteria-free self-selection ended up as the default, with the implication that no basis existed for distinguishing among developing countries in terms of their varied stages of development or their development needs.

Attempts have been made to establish criteria for defining developing country status, mostly without success. In 1971, however, the United Nations (adopted by the GATT in 1979⁶) created the sub-category of least-developed developing countries (LDCs) among developing countries. This grouping, currently comprising 47 countries, varies in composition over time depending on an agreed set of criteria. Consequently, some have joined and others have left since 1971. Implicit in the approach is the idea that eventually no LDCs will remain.

An example of a more disaggregated country-wise definition based on developmental status is that of the World Bank. The Bank has categorized countries into low-income, lower-middle-income, upper-middle-income and high-income groupings. It was able to do this without the need for a formal consensus decision by affected parties. Modifying its own status quo is not something the WTO could easily do.

The likelihood of reaching agreement on a formal categorization of developing countries at the WTO is on a very narrow spectrum of somewhere between exceedingly remote and impossible. Yet many developing WTO members would likely support finer distinctions among their number.

Those at the upper end of the developmental spectrum, on the other hand, would resist the fragmentation of development status definitions precisely because they fear that such a process could force them into full repudiation of S&D. Such an outcome would fail to accommodate the reality that even if higher-income developing countries are competitive at a world-class level in some sectors, they still have to manage a soft underbelly of developmental challenges in others.

In reality, some differentiation occurs because developed countries tailor their non-reciprocal market access preference schemes to individual (and sometimes groups of) developing country members on the basis of their own criteria. Additionally, developing countries themselves do not in practice avail themselves of S&D to the same extent, and some do not resort to S&D at all.

Despite these de facto departures from the default position, the binary approach (LDCs excepted) based on self-selection has been more of a hindrance than a help in navigating the complex challenges of aligning perceptions of an appropriate, development-relevant, balance of rights and obligations among members. Development status has been a lightning rod for disagreement and fractious debate that has fed deadlock. The standoff has been aggravated by the shift of the economic centre of gravity in recent years away from the United States and Western Europe towards Asia and other regions. We argue that trying to work on agreed definitions of national development status would be a forlorn, result-free effort. A solution to the current impasse would be to move towards a country-specific sector- and activity-based approach to differentiation.

6. As part of the results of the Tokyo Round, the 1979 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (also known as the Enabling Clause) adopted the UN definition of LDCs, essentially sanctioning an additional layer of S&D for the grouping, whose separate treatment could not be challenged on MFN grounds.

Elements of S&D and Alternative Approaches to Defining the Balance of WTO Rights and Obligations

The manner in which the multilateral trading system under the GATT developed has exerted significant influence on its subsequent evolution. That influence has not always promoted GATT/WTO objectives, in particular the economic advancement of developing countries. As we shall see in this Section, this is not to suggest that S&D under the GATT has been uniformly inadequate. We will also examine innovative and arguably more promising approaches introduced by more recent agreements.

The areas singled out here for brief review include market access in goods, certain non-tariff measures, agriculture, services, trade-related intellectual property rights, and the Trade Facilitation Agreement. These areas were selected to illustrate particular approaches to the formulation of S&D from which we believe we can learn.

In a comprehensive tallying exercise⁷, the WTO Secretariat lists 183 S&D provisions in WTO agreements, not counting the provisions contained in 31 Ministerial and General Council decisions. Half of these provisions are aimed at safeguarding developing country interests or providing flexibility in commitments or action under them. The rest deal with transitional timeframes, technical assistance, increasing trade opportunities, and LDC-specific measures. The Secretariat's paper shows that many of these provisions are voluntary or "best endeavours", and a number have lapsed with the end of the Uruguay Round implementation phase.

Market Access: Tariffs

CONTRACTUAL MARKET ACCESS IN GOODS: IS THIS S&D OR AN OPPORTUNITY TO NEGOTIATE?

On the goods side, tariff negotiations constituted the core of the GATT in its earlier years and was the remit of the Doha negotiating group on NAMA (Non-Agricultural Market Access). As a result of the GATT emphasis on tariff negotiations, it was also where S&D first became an issue. This was 'traditional' S&D – the understanding that less would be expected from developing countries, reflecting their low level of integration into the global economy. Section II briefly charted the evolution of this issue, leading to the point where developed countries offered preferences outside the system and developing countries assumed lesser obligations within it. We referred to this as the 'minimalist bargain,' enshrined in Part IV of the GATT and the waiver for tariff preferences (later the Enabling Clause without a waiver – see below). This was how industrialized countries mitigated rivalry from competitive developing countries on sensitive products in key sectors, exchanging exclusion for Part IV and its underlying approach to developing country obligations. A significant feature of Part IV was the assertion of the principle of non-reciprocity in Article XXXVI:8. Non-reciprocity meant that developing countries would not be expected, in the course of trade negotiations, to make contributions inconsistent with their individual development, financial and trade needs. Non-reciprocity has never been more clearly defined than that, and just like the later and closely linked

⁷ WT/COMTD/W/219, 22 September, 2016. An updated version of this paper that includes data on the Agreement on Trade Facilitation will be issued soon.

concept of S&D, a definition of reciprocity or its inverse has eluded the precision that might have avoided some of the debates which continue to dominate the discussion of developing country participation in the trading system.

If the origins of the 'North-South divide' in the GATT and WTO can be traced to Part IV and non-reciprocity, it is nonetheless important not to overstate the precision of the divide. Since all WTO members have contractual schedules of commitments, they are on the same spectrum, just at different points. Their respective places on it vary by tariff line or sector – no two members have identical tariff schedules. The challenge of striking reciprocal bargains is certainly one factor shaping tariff schedules. But the highly varied content of individual schedules does not follow a pattern that offers up a clear dividing line between schedules benefitting from S&D on one side and schedules devoid of S&D on the other. Virtually no individual member's schedule is free of high tariffs in particular sectors or product lines that reflect sensitivities.

In the case of developed countries matters went beyond tariffs with the effective exit of textiles and clothing from mainstream GATT disciplines from the mid-1950s until 2005. High MFN tariffs continue to exist today on many labour-intensive manufactures, and in many cases, tariffs continue to escalate along processing chains. High protection levels also persist in agriculture, as we shall see later. It should also be noted that some of these features are also apparent in the schedules of certain developing countries.

As part of the 'minimalist bargain,' many developing countries still have limited tariff commitments and maintain many bound tariffs considerably above their MFN applied rates. Apart from the enunciation of the principle of non-reciprocity in Part IV, there are provisions that recognize the need for greater trading opportunities for developing countries (Article XXXVI), undertakings by developed countries to provide better access to their markets (Article XXXVII) and commitments for joint action and support to promote development through trade (Article XXXVIII). But none of this is contractual. It is a matter for best-efforts.

The 1979 Enabling Clause introduced permanent legal cover for unilateral preference schemes. These kinds of preferential arrangements have proliferated since, aiming for the most part to target the poorest members of the WTO. Such schemes include as the EU's Everything But Arms initiative, from which only LDCs can benefit, and the US African Growth and Opportunity Act. Waivers are also used in some cases to provide legal cover for unilateral preference schemes in favour of developing countries. The Clause also introduced the notion of graduation (paragraph 7). The relevant text states that developing countries (and LDCs) "expect that their ability to make contributions or negotiated concessions or take other mutually agreed action under the provisions and the procedures of the General Agreement would improve with the progressive development of their economies and improvement in their trade situation and they would accordingly expect to participate more fully in the framework of rights and obligations under the General Agreement."

A substantial body of analysis suggests that preferences have had limited impact as an instrument of development and diversification. As already noted, they are outside the WTO system, lack basic legal protections and are vulnerable to conditionalities. They can have a negative effect inside the system as well, fomenting divisions between preference recipients and others, as in the banana disputes, and making MFN negotiation more difficult.

THE 'MINIMALIST BARGAIN' ON MARKET ACCESS DID NOT LAST

By the 1970s things were beginning to change. Many more developing countries had gained independence from the colonial powers and become members of the GATT. Some developing countries were growing their shares of world trade and gaining influence, and the 1970s were punctuated by commodity price shocks that hurt commodity importers (largely developed countries) and fueled inflation. All this meant

that both sides of the 'minimalist bargain' were increasingly dissatisfied with the implicit understandings that had initially informed the arrangements. Developing countries bargained for more, frustrated with limited progress on Part IV promises and persistently high protection levels on their leading exports of interest. Developed countries, for their part, were pushing back on an undifferentiated definition of developing country status.

The Part IV approach does not work for the system any more, if it ever did. Its inadequacy was exposed in particular by the Enabling Clause, which attempted to pull the system in two conflicting directions – both more preferences and graduation. It has become increasingly clear that higher income developing countries, including the large and increasingly powerful among them, cannot be dealt with in that framework.

POSSIBLE WAYS FORWARD

When the international political climate makes it possible to resume MFN market access negotiations, their design should make it attractive for all members to be fully involved. The right kind of negotiating modalities can help. Request and offer negotiations by themselves reinforce reciprocity and weaken developing countries' positions. The harmonizing formula approach proposed in the Doha Round (also referred to as the Doha Development Agenda – DDA) were proceeding in the right direction before the negotiations collapsed, as they provided a means to tackle the tariff peaks and escalation that still hamper developing countries' progress up the value chain. Other approaches could also be tried, such as introducing average cuts in all tariffs, with minimum cuts, plus request and offer and sector-based negotiations to top up as needed, with all tariffs bound. Consideration could also be given to the elimination of gaps between applied and bound rates.

Meaningful progress towards exchanging fully contractual market access is long overdue. There must be a bargain for the taking where developed countries would exchange low MFN tariffs on products of interest to developing countries in exchange for greater contractual tariff commitments on the part of developing countries, especially from those at the upper end of the income range.

Such a process would be further enriched if developing countries also reduced tariffs on products of interest to one another in their respective markets. Developed countries may still be reluctant to reduce tariffs if they feel that some trading partners with significant market shares will be able to free-ride on the cuts, or that the cupboard will be empty when it comes to future negotiations. Formula-based approaches may help. But a more far-reaching and mutually beneficial approach would be to transcend a narrow market access focus and embrace a broad-based agenda across the range of trade issues that can usefully be addressed in the WTO. There is no member of the WTO that wants nothing, nor any that can give nothing.

The process would doubtless be gradual, and in the market access domain preferences would shrink in relevance. Poorer developing countries would need to be supported in adjusting to preference erosion rather than standing in opposition to it. An underlying advantage here would be the diminution of dependence on preferences in respect of which recipients have no control. Ultimately, preference erosion is an inevitability it would be better to prepare for and garner support in managing rather than simply succumbing to at a time of someone else's choosing. The treatment of market access that is useful to developing countries could then move from being an S&D-fueled afterthought to an integral and supportive part of the multilateral trading system. Developing countries stand to gain more by strengthening MFN than they do by continuing to press for MFN exemptions.

The more the system moves away from preferentialism as a mechanism for securing better market access and towards MFN liberalization, the more solid becomes the contractual relationship among the membership. By extension, the less will members have to face intractable questions and

endless arguments about S&D dominated by binary thinking.

Everyone is on the same spectrum in relation to the levels of committed market access and the challenge is to shift members' positioning on that spectrum towards mutually beneficial bargains. The record in recent years of unilateral and preferential tariff reductions via preferential trade agreements suggests there may be a bargain to be struck. Progress would be gradual and would call for a spirit of give and take, driven by clarity about the benefits to be gained from properly crafted market opening as part of a package. Such a scenario would be more likely if the notion of S&D were less central to the debate. That would signal recognition of the reality that when it comes to members' market access commitments, everyone is a recipient of some of what goes by the name of S&D.

Non-Tariff Measures:

THE REGULATORY SIDE OF TRADE COOPERATION

The articulation of a balance of rights and obligations in relation to non-tariff measures (NTMs) has not been straightforward. This is in part because NTMs are multi-purpose within the workings of the trading system and can be price-based, quantitatively determined, or regulatory in nature. They may include: 1) contingency measures (e.g. balance-of-payments problems, anti-dumping and countervailing duties, and safeguards); 2) flexibility in the use of certain measures for developmental reasons (e.g. quantitative restrictions, tariffs, subsidies); 3) flanking measures to protect other commitments (e.g. rules on import licensing or customs valuation); and 4) a range of public policy objectives (e.g. standards relating to both products and processes).

Moreover, in many cases, the design and application of public policy-related NTMs can fulfill two purposes – one legitimate and the other less so. The legitimacy resides in public policy objectives reflecting social imperatives and preferences. The lack of legitimacy arises when NTMs are used for protectionist purposes, going beyond what is necessary to meet a public policy objective. This is why the notion of 'least trade-restrictive' is central to some NTM interventions.

A single approach to S&D design cannot be applied in all cases where NTMs are used. Over the years the GATT expanded the detail and scope of its reach on non-tariff measures (NTMs). In some cases, notably in the Tokyo Round ⁸ (1973-79), existing provisions on subsidies and countervailing duties, anti-dumping, customs valuation, import licensing and technical barriers to trade were developed and made more specific. These were known as the Tokyo Round Codes. The agreements built on provisions that already existed in the GATT Agreement. Other rules such as those on government procurement were written from scratch during the Tokyo Round. S&D provisions are embedded in the new Codes. The provisions expressed in this fashion have come to represent the bulk of S&D addressed to NTM measures in the GATT/WTO. These arrangements were legitimized as a departure from MFN in the Enabling Clause.

Notwithstanding the S&D provisions embedded in the Codes, signature of these agreements was optional and developing countries could decide if and when to sign onto them. At the same time, save for the Agreement on Government Procurement (GPA) ⁹, the Codes were to be applied on an MFN ¹⁰ basis. Of the Tokyo Round Codes, the one on government procurement was the least popular and was only signed by about a dozen

8. Additional provisions were developed in the Uruguay Round, including on sanitary and phytosanitary measures, pre-shipment inspection and rules of origin.

9. The GPA did not emerge from pre-existing GATT provisions, as government procurement was explicitly excluded under Articles III (national treatment) and XVII (state trading). There were thus no acquired rights to be protected and discriminatory treatment of non-signatories was not a matter of contention.

10. Agreements similar in design to the GPA related to civil aircraft, bovine meat and dairy products, but these were of lesser significance.

developing countries. The most popular was technical barriers to trade, which attracted over 45 signatories.

When it came to the Uruguay Round, the Code approach permitting voluntary signature of newly negotiated agreements was terminated. There was a 'single undertaking'¹¹ which meant that all GATT contracting parties had to subscribe to the entire Uruguay Round package in order to make the transition to the WTO. This meant many developing countries incurred a new set of obligations from one day to the next. Special and differential treatment under the WTO was incorporated as an exception (often time-bound) of one sort or another to a mainstream discipline.

The new single undertaking approach gave rise to what was initially referred to as the Implementation Agenda. Groups of developing countries established lists of proposals for adjustments to existing provisions that would lessen the level of obligation – in other words, to augment legally binding S&D. The proposals underlying this exercise have come to be referred to as Agreement-Specific Proposals (ASP). In the latest iteration of the proposals, the number has come down from dozens to ten. These proposals were tabled by the ACP Group, the African Group and the LDC Group in July 2017. They deal with Trade-Related Investment Measures, GATT 1994 provisions covering industrial development (Article XVIII.A and C), GATT 1994 provisions on measures taken for balance-of-payments reasons (Article XVIII:B), sanitary and phytosanitary measures, technical barriers to trade, subsidies and countervailing measures, customs valuation, the Enabling Clause, technology transfer and LDC accessions to the WTO. This is not the place to evaluate the merits and feasibility of the proposals. Suffice it so say that despite the many hours have been used up in discussing them, deep and seemingly irreconcilable divisions remain. Since the likelihood that significant progress will ever be made is remote, there seems little point in persisting with the exercise in its current format. On the other hand, the underlying issues will not vanish, so a better way needs to be found to address them. Some possible options in a re-oriented approach to dealing with these challenges are discussed further below and in Section IV.

AGREEMENTS COVERING STANDARDS

We have singled out standards agreements for separate consideration – the Agreement on Technical Barriers to Trade (TBT) and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) – because they carry a number of lessons that might be applied in other regulatory areas. Special and differential treatment under the two agreements is similar. Both Agreements recognize the special needs of developing countries relating to technical and financial resource constraints. Easing these constraints allows developing countries to meet compliance challenges, serve more export markets, and participate more fully in international standard-setting activities.

Questions are sometimes addressed to members about the justification for setting standards higher than those developed internationally. Such questions may at times be legitimate, but no country can be expected to lower standards on the altar of the needs of other parties if this were considered to compromise the rights of members to protect their fundamental public policy objectives. The absence of any wiggle room in this basic sense still leaves room for flexibility in some areas, such as phase-in periods, consultation, and transparency.

The absence of possibilities to compromise on fundamentals has intensified a spirit of cooperation among parties with quite different capabilities and priorities to innovate and focus on other ways of ensuring the fullest possible participation of all parties in crucial areas of public policy.

Technical assistance has been an important feature of development support in the standards area. Moreover, this technical assistance has been provided not only by WTO member governments, but also by numerous international bodies and organizations and the WTO Secretariat. On the TBT side technical

11. The Uruguay Round was launched with a single undertaking which essentially stated that nothing was agreed in the negotiations until everything was agreed. This was considered insurance for all parties that their interests would not be ignored in the final package. It was a very different notion of a single undertaking than the one that ended the Uruguay Round, which required that all elements of the package must be agreed for parties to become members of the WTO.

assistance has been forthcoming to help developing countries set up their own standards regimes and participate more fully in international standard-setting activity.

An exemplary initiative on SPS capacity-building is the Standards and Trade Development Facility (STDF), established in 2004 and jointly supported by the WTO, FAO, WHO, OIE and World Bank. The STDF's funding comes mostly from developed WTO Members on a voluntary basis. The STDF helps to identify and disseminate good practice related to SPS capacity-building and provides funding for the development and implementation of projects that promote compliance with international SPS requirements. The Committees of both the TBT and SPS Agreements have a standing agenda item dealing with Specific Trade Concerns (STCs). This innovative feature of committee work provides an opportunity for members to raise particular problems they have encountered with standards-related activities in importing countries. Instead of using formal dispute settlement procedures to address grievances, these are raised and discussed in Committee. This arrangement cannot be characterized as an S&D feature of standards-related activity under the two agreements, but it is a practical means of addressing trade problems that particularly favours more resource-constrained governments. The STC approach is simpler, less expensive, faster and more transparent than dispute settlement.

The data ¹² show how eclectic the use of the STC mechanism has been over the years. Some 548 STCs were brought to the attention of the TBT Committee from 1995-2017. The same concerns were frequently raised more than once. In the 1995-2017 time period, around 18 per cent of the total were raised in six meetings or more. About one-quarter were raised in three to five meetings and over half were raised in one or two meetings. The TBT Committee does not report how many of these were satisfactorily settled but the above numbers serve as a pointer. The concerns were raised by a wide range of members. Bearing in mind that the same concerns were often raised by several members jointly, of those doing so between 1995 and 2017, 45 per cent were raised by developing and emerging members, 54 per cent by developed members and one per cent by least-developed members.

In the case of the SPS Committee, from 1995 to June 2018 a total of 525 STCs were raised. Around 47 per cent were raised by developed countries, 51 per cent by developing and emerging economies, and 2 per cent by LDCs. The parties maintaining the measures raised were also quite evenly split between developed and developing and emerging economies. A total of 508 measures were implicated over the same time period, with 48 per cent maintained by the developed countries and 52 per cent by developing and emerging economies. The SPS Committee reports indicate that during the period between 1995 and mid-2018, 37 per cent of the measures raised had been resolved, 8 per cent partially resolved and the remaining 55 per cent were not reported upon.

The legal basis for the STC approach exists in other committees but has been less used. Finding ways of increasing reliance on STCs beyond the TBT and SPS Committees would make a significant contribution to increased participation in the WTO. Greater reliance on this instrument would also diminish any need or justification for differentiated treatment among members.

POSSIBLE WAYS FORWARD

Four lessons can be drawn from S&D-related activities under the TBT and SPS Agreements. Some of these could have wider application in the search for effectiveness in the NTM field. First, since flexibilities are circumscribed because of the public policy imperatives at stake, S&D measures need to focus on actions supportive of inclusiveness without requiring exemptions that materially affect outcomes. Second, well-targeted technical assistance can be an important part of S&D without making contentious inroads into the integrity of the rules. Third, when inter-agency coordination is allowed to flourish and draw on the best

12. These data are reported by the relevant Committees and published on the WTO Website

available expertise, technical assistance is likely to be most effective. Fourth, the experience with specific trade concerns (STCs) raised in committee demonstrates how development-friendly outcomes can be secured without necessarily applying the S&D label.

Trade in Agriculture

S&D IN THE AGREEMENT ON AGRICULTURE

The key innovations of the Agreement on Agriculture (AoA) – tariffication, universal binding and the domestic support framework – apply to all WTO members. The Agreement contains S&D provisions covering contractual commitments both in substance and timing. Some of these are mandatory, others can be given effect directly through action on the part of beneficiaries and others still are of a best-efforts nature. At the same time, the AoA also contains elements that cater to developed-country interests, both in market access and in subsidies.

The contractual commitments embodied in the schedules of developing countries and LDCs reveal a clear separation of developing-country undertakings, reflecting precise modalities. Under these modalities, developing countries could schedule ceiling bindings, longer implementation periods, and lower reduction commitments in market access, domestic support and export subsidies.

MARKET ACCESS

The AoA prohibits non-tariff restrictions on imports. The ‘tariffication’ process converted non-tariff border measures into tariffs under prescribed negotiating modalities. Pre-existing tariffs on all other agricultural products were to be reduced, and all tariffs were bound. Tariffication produced prohibitively high tariffs on some products in a number of markets, and minimum access commitments were agreed through quotas at reduced rates (tariff quotas). For developing countries, average tariff reductions were 24 per cent (minimum 10 per cent) over 10 years. The comparable figures for developed countries were 36 per cent over 6 years (minimum 15%). Least-developed countries were not required to undertake tariff reduction commitments. Where “ceiling binding” commitments were undertaken by developing countries, reductions were not required except on an ad hoc basis.

DOMESTIC SUPPORT

The new architecture divided domestic subsidies and other support into two main categories or “boxes”, based on the degree of trade distortion they imparted. The Aggregate Measure of Support (AMS or “Amber Box”) was established as the instrument for policy comparison and discipline. The Green Box contained permitted support not counted in the AMS and thus not subject to reduction commitments. Many developing country measures were covered by the Green Box or by Article 6.2, the “Development Box”. Late in the negotiation a third category, the Blue Box, was introduced at the demand of major developed country subsidizers. This exempted direct payments linked to production-limiting programmes from the AMS and from reduction commitments.

For developing countries, the total AMS was to be reduced by 13.3 per cent over 10 years, compared with 20 per cent over six years for developed countries. For both sets of countries, the final AMS after reduction was bound as a ceiling. Least-developed countries had to bind their AMS support level, if applicable, but were not required to reduce it.

It should be noted that the AMS calculations, which use the base year of 1986-88, mean that even after reduction the major developed-country subsidizers retain a considerable amount of headroom in their AMS ceiling bindings.

Permitted departures from mainstream rules are particularly important in the domestic support pillar.

All of these are mandatory provisions in the sense of being legally bound. Developing countries can make use of them in calculating and reporting their current domestic support outlays in relation to their AMS or de minimis limits.

Crucially, the de minimis provision allows members to exclude a percentage of support based on current output value from the AMS. For developing countries, the de minimis level is 10 percent, whereas for developed countries it is 5 per cent. For China, under the terms of its accession, the de minimis level is 8.5 per cent. Given the generally low-or zero- levels of AMS entitlement among developing countries, de minimis has become the effective ceiling on domestic support by developing countries, albeit one that moves with the value of production. It has thus become a focus of contention, notably between the US and China.

Article 6.2 permits developing countries to exclude from the AMS some types of investment and input subsidies under certain conditions. Use of this exception has also received increasing attention with the expansion of production in some larger developing countries.

The purchase of foodstuffs at administered prices for public stockholding for food security purposes in developing countries is covered by the Green Box, as long as the difference between the acquisition price and the external reference price is accounted for in the AMS. This provision too has become contentious, with some developing countries arguing that purchases at administered prices should be excluded from the AMS calculation when aimed at supporting low-income and resource-poor producers.

EXPORT COMPETITION

Unlike the situation in industrial goods trade, export subsidies continued to be permitted under the AoA. An effort was, however, made to reduce and discipline them. Developing countries were required to undertake two-thirds of the reduction applicable to developed countries (which was 21 per cent by volume and 36 per cent by budgetary outlay), over ten years rather than six.

The provisions of the AoA have not been amended since its entry into force. However, the Nairobi Decision on Export Competition effectively revised the relevant parts of the Agreement by committing members to the elimination of export subsidies and to disciplines on other equivalent forms of export assistance. The Decision contained S&D elements in the form of longer time periods for developing countries to eliminate export subsidies, including the disputed entitlement under Article 9.4¹³. The end-point of elimination of export subsidies is the same for all. This decision was a new contractual commitment, one that is being embodied in revised schedules, but which also has an impact on the rules. This approach may possibly point to a pathway for handling other rules issues.

OTHER DECISIONS AND AREAS OF ACTIVITY

Best-endeavours provisions in the AoA, apart from general preambular exhortations, include those under the related Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least- developed and Net Food-Importing Developing Countries. This is a hybrid insofar as it commits members to a process of monitoring and review and adds best-endeavours undertakings concerning the maintenance of food aid and financial assistance.

The situation is similar for cotton, which has received considerable specific attention since the Hong Kong Ministerial in 2005. The 2015 Export Competition Decision commits Members to eliminate export subsidies on cotton immediately. However duty-free quota-free market access for LDC cotton, the most politically sensitive aspect for developed-country producers, is to be granted only to the extent provided for in preferential trade arrangements, which are of course multilaterally non-binding.

13. The subsidies in question relate to marketing costs for agricultural products and internal transport and freight charges on products for export.

POSSIBLE WAYS FORWARD

The social and political importance of agriculture in many countries at all levels of development will doubtless continue to make trade liberalization in this sector especially difficult. This is not a reason to abandon the mandate for continuing the reform process; on the contrary it argues for putting more effort into it. Very high barriers remain in agriculture among both developed and developing countries, as well as trade-distorting subsidies. Many countries have a strong interest in seeing these reduced. The complex modalities developed in the DDA agricultural negotiations were a heroic attempt to strike a balance in the AoA tradition of ambition offset by exceptions. While that approach may no longer be desirable or possible, it remains true that accepting a balance of commitments between developed and developing members is the key to unblocking negotiations.

The AoA was a radical new piece of architecture in terms of the system, and to make it acceptable a range of compromises had to be made. The core compromise was on domestic support, where developing countries assumed lesser reduction commitments, longer time frames and some exemptions from disciplines. In exchange, the major developed-country subsidizers retained substantial headroom in their AMS commitments as well as the possibility to maintain product-specific AMS concentration, the subject of complaints by China and India among others. There is also a category of AMS exemption which in practical terms works only for them – the Blue Box. This epitomized S&D for the rich. After tariffication, a number of developed countries also retained very high tariffs on certain products, such as rice, dairy products and sugar. Tariff-rate quotas have had only a very limited effect in expanding access to these markets.

The AoA was intended to begin a continuing reform process that would have provided an opportunity to return to these issues. Unfortunately, the continuing negotiations in agriculture – particularly concerning market access – sank with the DDA of which they had become part.

Efforts to revive the negotiations on Domestic Support have hit a wall over issues of appropriate levels of contribution. In particular, China resists any idea of further disciplines on its de minimis subsidy level as long as the US, EU and others retain generous AMS ceilings, noting that it does not benefit from the 10 per cent de minimis available to other developing countries nor article 6.2 support¹⁴. Meanwhile, some developed countries with high levels of protection resist meaningful market access initiatives.

At the same time, some developing countries are campaigning to enlarge the existing scope of S&D in the AoA rules. Specifically, they call for an extra Special Safeguard Mechanism for developing countries and an expansion of the Green Box coverage of Public Stockholding for Food Security Purposes to exempt administered prices from the AMS. These were measures contemplated in the draft modalities known as Rev.4, the proposed blueprint for concluding the negotiations tabled in 2008. However, they were placed in the overall context of an ambitious liberalizing outcome. In that context they continued the “bargain” tradition of S&D as exemption from disciplines. With the effective demise of the rest of Rev.4, the continuing pursuit of these two issues takes S&D to a new level. They represent an attempt to rewrite existing rules outside a full negotiation. This has produced controversy and division, among developing countries as well as with developed countries.

So whatever “bargain” there once was in agriculture has broken down. What remains, the legal and prescriptive approach to S&D embodied in the AoA – what one might call “hard” S&D – appears to have failed to resolve anything. It may even be making matters worse. Exceptions or special provisions designed to deal with issues current at a particular time may become less relevant or have unintended

14. This relates to subsidies to encourage agricultural and rural development, investment and input subsidies, and subsidies to encourage diversification away from growing illicit narcotics.

consequences as circumstances evolve. However, once enshrined in WTO agreements, they are very difficult to change. The outcome can be S&D provisions frozen in time and incapable of responding to changing needs.

For agriculture, the answer appears to be the resumption of full negotiations in line with the continuation clause of the AoA. To enable this to happen a balance needs to be found between the two competing types of S&D, that for the developed and that for the developing countries. There could be a bargain-in-waiting here. It would mean, for example, developed countries being prepared to offer meaningful reductions in high tariff levels and subsidies and developing countries being prepared to take on commitments commensurate with their growing trade significance. So far, however, there is little sign of this balance emerging. A broadened negotiation going beyond a simple developed-developing country axis to include exchanges among countries with similar developmental characteristics would enrich the undertaking. The creation of opportunities for negotiations across issues and beyond market opening would also enhance the possibility of mutually beneficial outcomes.

Trade in Services

By the time the GATS was negotiated in the late 1980s and early 1990s, thinking on international trade cooperation had evolved. This is reflected in aspects of the way provisions on differentiated treatment for developing countries were formulated. No mention is made of S&D as such. Differentiated rights and obligations among members based on developmental considerations can take multiple forms. In part, the structure of the GATS itself has enabled greater diversity in the approach to balancing the rights and obligations of individual members through individually tailored negotiated outcomes over successive rounds. Sharp distinctions between a self-designated group of countries calling themselves developing and the rest of the membership are easier to blunt under the GATS architecture. This also reflects differences in predominant market characteristics between trade in goods and trade in services. Nevertheless, it is interesting also to ponder how different the GATT might look if it had not been written 40 years earlier.

MAJOR ELEMENTS OF FLEXIBILITY IN GATS FOR DEVELOPING COUNTRIES

We have argued earlier that reliance on preferences offered by developed countries in exchange for minimal commitments from developing countries on market access in the GATT context did not build a solid base for mutually advantageous cooperation on trade liberalization among countries at different levels of development. This was not helped either by the juxtaposing of MFN and reciprocity. Neither the word reciprocity nor non-reciprocity appear in the GATS Agreement. Moreover, non-contractual preferences are not a feature of GATS, with one exception.

In December 2011, a Ministerial Decision was taken to grant preferential treatment to services and service suppliers of LDCs. The Decision constitutes a waiver to for members to deviate from their MFN obligation in order to grant preferences to services and service suppliers of LDCs. The impact and implications of this decision remain somewhat unclear, but it is a sharp departure from the architecture of the GATS aimed at managing a balance of rights and obligations among diverse WTO members.

A centerpiece of GATS objectives is to increase the levels of market access and national treatment commitments of all members through progressive liberalization, subject to the necessary cautions regarding the accommodation of diversity among them. This diversity does not only revolve around distinct levels of development among members. Social, cultural and geographical factors, for example, can also play a part. At the same time, in Article IV:1 there is a strong presumption of self interest in developing countries undertaking more commitments to attract service suppliers to their markets to strengthen their domestic services capacity.

Article XIX:4 reinforces flexibility in the GATS approach to progressive liberalization in an important way. It envisages any combination of bilateral, plurilateral or multilateral negotiations to move the market opening process forward. The rights of members to non-discriminatory treatment are protected through basic GATS provisions, and those undertaking such negotiations can inscribe the results in their schedules of specific commitments. These arrangements are not specific to any single group of countries. They are available to all. Given the scheduling technology of GATS, the results of such negotiations may involve market access and national treatment obligations under Articles XVI and XVII or regulatory commitments under Article XVIII (additional commitments).

Nevertheless, there is explicit recognition in Article XIX:2 that individual developing countries may require flexibility to open fewer sectors and fewer types of transaction as they progressively extend liberalization in line with their development situation. In that context, GATS Article XIX:2 also foresees the possibility that developing countries may attach conditions to their market access obligations to accommodate the development objectives laid out in GATS Article IV. This approach emphasizes 'policy choice' in determining sectors, sequence, conditions, timeframe and conditions of liberalization commitments over 'policy space' arguments that tend to emphasize a preference for avoiding commitments. Article IV seeks to promote increasing participation among developing countries by strengthening their domestic service capacity, efficiency and competitiveness, in a process facilitated by commitments to be undertaken by different members.

Such commitments should also lead to improvements in access to distribution channels and information networks, as well as liberalizing sectors and modes of supply of interest to developing countries. Developed and other members where possible are required to set up contact points – distinct from the general obligation to establish enquiry points – to provide service suppliers of developing countries with information on their markets in relation to commercial and technical aspects of services supply, all relevant information on professional qualifications and the availability of services technology, to facilitate their participation in international services trade. Least-developed members are to be accorded special priority attention.

These provisions aimed at supporting developing countries all seek to progressively strengthen their market access commitments. Certain GATS Articles also contain flexibilities for individual developing countries, subject to consent by the Membership. These include the time that may be taken to establish enquiry points (Article III), the coverage of commitments included in a preferential economic integration agreement among a subset of WTO members (Article V), and the use of measures for balance-of-payments purposes (Article XII),

There is, however, one way in which the GATS is importantly different from the GATT. Several GATS provisions make a distinction between those applying when a specific commitment is in place and those when there is not. Such provisions include disciplines on transparency, domestic regulation, monopolies, and payments and transfers. For example, where specific commitments have been undertaken, domestic regulatory requirements are more exacting. Regulations are to be applied in a reasonable, objective and impartial manner. Tribunals or similar procedural arrangements must be in place to allow for appeals of decisions. Where authorization to supply a service is required, applications must be processed within a reasonable time period and information provided as to the status of pending applications. The domestic regulation disciplines, which are still under negotiation, must already be applied in a manner that ensures specific commitments are not undermined. Finally, where professional services are subject to specific commitments, foreign service suppliers must have access to adequate procedures to verify their competence. In tying higher levels of obligation to scheduled commitments, there is no longer a need to exempt parties explicitly

from regulatory obligations. The obligations are simply not operative if a member has yet to assume a specific commitment. Moreover, there is no explicit developing country special treatment here – the disciplines are the same for all.

THE GATS APPROACH TO ENHANCING ACCESS TO SERVICES MARKETS

As already noted, a basic objective of the GATS Agreement is to increase the level of specific commitments on market access, national treatment and additional commitments (Art. XVIII) among members. This is to be achieved through progressive liberalization in successive negotiations. The negotiations aim to provide effective market access with appropriate flexibility for individual developing members regarding the number of sectors and types of transactions to be committed.

The structure of the GATS Agreement provides considerable scope for progressive liberalization through a range of means. These include the four modes of supply (cross-border, consumption abroad, commercial presence and temporary presence of natural persons). As Article XX makes clear, additional trade opening measures can be expressed as terms, limitations and conditions on market access (Article XVI) and national treatment (Article XVII), undertakings relating to additional commitments (Article XVIII), and where appropriate time-frames for implementation and dates of entry into force. Finally, the absence of a mandatory requirement to follow a particular nomenclature for services commitments also provides flexibility, since covered sectors can be defined in a customized way rather than in terms of standardized definitions. Members have been guided in scheduling their commitments by the Central Product Classification (CPC) but there is no legal requirement to do so. This miscellany in approaches to commitments may introduce complexity and prove potentially ineffective if not used appropriately to produce positive outcomes. The point to be made here, however, is that the inherent flexibility available to members in how they enter into commitments takes the pressure off any notion of binary options between being committed to market opening and not being committed. Scope exists for all members to improve their levels of market opening in services. This approach, however, rests in its effectiveness on the negotiating function of the WTO and the will of members to pursue the process of progressive liberalization. It also takes into account the evolving nature of what would be considered an appropriate balance of rights and obligations.

MAIN TAKEAWAYS

In sum, four points stand out. First, the emphasis on progressive market opening for all at a pace that corresponds to the capacity, interests and priorities of individual members has helped to dilute any notion of a WTO membership bifurcated into two groups of economies – developed and developing. So too has the idea that GATS negotiations can take place in bilateral, plurilateral and multilateral configurations.

Second, the GATS has avoided resort to a one-size-fits-all approach in terms of expectations relating to the level and timing of commitments. Cornerstone obligations such as MFN are obviously intended to be the same for all members. Certain flexibility has been introduced, at least in terms of when the obligation applies to particular sectors of individual members. This flexibility is available to all Members, developed and developing alike.

Third, where specific provisions relating to developing countries are included in the GATS – whether in terms of what other parties (developed and developing countries) do on their behalf or what they are entitled to do for themselves – the emphasis is consistently on enabling beneficiaries to participate more fully in services trade rather than being exempted from certain provisions of the Agreement. Moreover, by linking higher levels of regulatory obligations in certain areas to the assumption of specific commitments, the Agreement provides flexibility through an incremental approach to building up levels of commitments. This is in contrast to a more traditional approach that sets a standard level of obligations from which deviations are permitted through S&D.

Finally, as in certain areas of GATT 1994 dealing with standards, considerable emphasis is placed on the scope for technical assistance which empowers beneficiaries to participate more fully in the WTO. Although the language on technical assistance may appear mandatory, a lack of specificity may render it unjusticiable. In any event, as with similar provisions in WTO agreements, neither the reach of Article XXV:2 on technical assistance nor the possibility that the provision is mandatory have been tested in dispute settlement. The main point is that giving and receiving technical assistance is in the shared interest of the entire membership. It should be noted, however, that the GATS extends the scope of technical assistance to service suppliers of developing countries through the obligation in Article IV to establish contact points.

Trade-Related Intellectual Property Rights

The TRIPS Agreement was another Uruguay Round innovation. Like the GATS, it handles S&D mainly by enabling individual solutions within a framework of agreed principles, with staggered implementation timetables (now concluded, apart from for LDCs). Developing country TRIPS negotiators accepted, in effect, that they were better served by the transparent rule of law, in the form of multilateral rules that define legitimate expectations regarding IP protection and would preclude unilateral trade sanctions. Accepting this pragmatic way ahead meant expressly maintaining domestic policy flexibility – a particular concern for developing country negotiators, but a concern for developed countries also, as clusters of interests challenged assumptions about traditional ‘North-South’ divisions.

The resultant text established a set of principles sufficient for effective interoperability of national IP systems for firms relying on recognition of IP rights. TRIPS, described technically as a minimum standards agreement, can therefore be understood as an ‘adequate standards’ agreement. The scope for S&D – and indeed for accommodating policy objectives of developed countries too – is realized in the way Members choose to implement the Agreement’s broad principles in their domestic IP regimes.

The record of TRIPS implementation is a catalogue of ever more tailored and distinctive national measures giving effect to the broad principles and standards of the TRIPS Agreement. This reflects a pattern of significant, and growing, diversity in the policy choices and legal mechanisms chosen and implemented by WTO Members across the full spectrum of economic status and legal heritage, giving concrete support to the growing understanding that the TRIPS Agreement was not in effect a harmonized model law nor a code but rather a platform to sustain broadly interoperable but distinct domestic IP systems which retained considerable scope for policy approaches tailored to fit national needs and circumstances.

Similarly, dispute settlement has not followed the ‘North vs. South’ trend that many feared. It has seen strong recognition of the value of coherence in international law and policy, offering avenues for recognition of wider policy issues, while remaining true to the actual text as agreed between WTO Members. Compared to the pre-TRIPS era, the benefits of the “rule of law” are manifested in the inevitably contested area where IP interests are pursued through trade avenues, although this picture has become more complex recently with the layering of ‘TRIPS plus’ standards in RTAs, blurring somewhat the outlines of the established multilateral standards.

As we have seen in services and even more strikingly in SPS, technical assistance and capacity-building are an essential counterpart to a more diversified and individually tailored approach to S&D. This has become a major aspect of the WTO’s TRIPs work, and also one where co-operation among multilateral, regional and bilateral providers is vital.

Trade Facilitation Agreement

The Trade Facilitation Agreement (TFA) is the latest multilateral agreement to be negotiated in the WTO. It entered into force on 22nd February 2017 for those members ratifying it (some 138 members so far). The TFA introduces measures to simplify and reduce the costs of administrative procedures associated with the importation and exportation of merchandise. The Agreement elaborates on three pre-existing GATT Articles – Article V on Freedom of Transit, Article VIII on Fees and Formalities connected with Importation and Exportation, and Article X on Publication and Administration of Trade Regulations.

The TFA contains detailed provisions on numerous procedural aspects of international trade in goods. These include transparency, notifications, the streamlining of documentation, customs clearance, and inspections. It also regulates customs fees and charges, as well as a range of regimes including temporary admission, inward and outward processing and goods in transit. It contains provisions on advance rulings, release and customs clearance, customs brokers, border agency cooperation and administrative decisions and appeals procedures.

The reason for singling out the TFA here is because it includes novel S&D provisions that could be seen as a future model. The first thing to note is that it is in the nature of the subject matter – rather as one might think of the Agreement on Import Licensing, for example – that administrative procedures are about efficiency and cost-cutting. Unless a government seeks to use administrative procedures as a means of providing local industry with surreptitious protection, the objectives of the TFA are unambiguously in the common interest. The objective is to ensure that members converge around policy and regulatory approaches that minimize transactions costs associated with trade.

The challenge, therefore, is how to achieve this convergence – of outcome, not necessarily of procedural approach – among a group of economies at different levels of development and preparedness. The elements here are the timeframe for compliance and the technical and financial wherewithal to meet the obligations laid out in the Agreement. The traditional way of doing this in the GATT was to agree a time limit for developing country implementation. This would be accompanied by best-endeavour entreaties in the relevant text, aimed primarily at developed countries, to supply the necessary support.

The TFA has taken a different tack to address both of these elements. The core of the solution lies in a scheduling approach to commitments that permits individual members to list their (common) commitments into three possible categories. Category A commitments are for immediate implementation upon adoption of the Agreement. Category B commitments will be implemented within a transitional time period specified by the member concerned. Category C commitments are also time-bound obligations but conditional on technical assistance to be provided by other Members.

This approach places responsibility for determining the timing of commitments on the members assuming them and whether technical assistance is required to meet their obligations. Presumably this implies a sense in which technical assistance is indeed obligatory, although doubtless both sides of the arrangement would negotiate the matter should this be necessary.

Making the conditions of access to S&D the subject of an undertaking by the benefiting party fosters buy-in. Some reservations have been expressed about the possibility that this kind of self-determination may simply lead to members doing nothing. In that case they would have violated their commitments. Moreover, the nature of the commitments made individually is there for everyone to see. The capacity to make comparisons in the form of peer pressure is likely to encourage members to take their responsibilities seriously should they have been tempted to do otherwise. Moreover, as growing numbers of countries streamline and reform customs-related requirements, the demonstrations effect will turn those who fail to do so into outliers.

Summary and Conclusions

General Considerations

DEFINING S&D IS NOT STRAIGHTFORWARD, BUT IT IS IMPORTANT TO CLARIFY ITS PURPOSE AND UNDERSTAND ITS CONSTITUENT PARTS

The starting point of our analysis is that development can be significantly supported by trade and that effective S&D can play an important role in enabling developing countries to engage effectively in trade and reap the benefits of specialization.

Trade policy alone cannot constitute a development policy. Development will prove elusive without a supporting domestic environment in which trade policy is merely one of a number of policy levers forming part of a coherent whole that underwrites economic progress.

Political and social conditions matter too, as does the quality of governance. These realities are hardly unique to developing countries alone.

Special and differential treatment takes many forms. Just as there is no workable single definition of a developing country, so it is with S&D. We have argued that some forms of S&D are more effective than others.

GETTING THE BALANCE RIGHT ON S&D IS A SHARED RESPONSIBILITY

The starting point of any successful attempt to secure and maintain a common view of the appropriate balance of rights and obligations in the WTO must be based on the recognition that this is a shared responsibility of the membership as a whole. This is so because all parties stand to gain from a less friction-filled narrative of what represents an appropriate balance. Opportunities abound for mutually beneficial bargaining among all WTO members to create a better multilateral trading system.

The minimalist bargain that characterized GATT relations between developed and developing countries in the early years left a shadow of contention, held back opportunities to gain from trade and has largely fallen apart.

The early exchange of preferences from developed countries for limited obligations on the part of developing countries in the domain of market access for goods was a minimalist bargain. It was not stable and it satisfied no-one. Although we recognize that change would entail some adjustment costs, the vestiges of this approach still hold back progress. A contractual, broad-based bargain going beyond the narrow focus of market access in goods should substitute these hobbled arrangements for mutually beneficial gains.

More recent experience in negotiations on non-tariff measures, in GATS and TRIPS, and in the approach of the recent Agreement on Trade Facilitation provide useful examples of how to manage S&D in its role of bringing the membership closer together in terms of their shared responsibilities.

Shaping Special and Differential Treatment

Beyond our diagnosis of what we can learn from past experience in relation to balancing rights and obligations among WTO members, much of this paper has focused on how S&D might best be shaped and used to the shared benefit of the entire WTO membership. By way of a summary, the main outlines of the analysis are reproduced in Table 1 below.

How should we think about and shape S&D?

WHAT IS THE ISSUE?	CONSIDERATIONS AND SUGGESTIONS	SOME APPROACHES/OPTIONS
What should be negotiated, how and when?	Little progress can be made in the absence of an effective negotiating function.	<ul style="list-style-type: none"> Market access in NAMA, Agriculture, GATS.
	Narrowly focused negotiations by topic can be more straight-forward but can also make bargains elusive. Broad-based negotiations straddling issues and interests may be the only way to get results.	<ul style="list-style-type: none"> Above negotiations are difficult without broader menu that offers tradeoffs.
	Progressive negotiations calibrated by capacity and need will often be more successful than narrowly-defined reciprocity. Varied configurations can be effective in identifying negotiating opportunities – be they bilateral, plurilateral or multilateral – as long as the outcomes are non-discriminatory.	<ul style="list-style-type: none"> Principle laid out in GATS (Article XIX:4) as a negotiating modality. Used as a modality in negotiations on telecommunications and financial services. Practiced under the GATT in ITA and EGA. Also taken up in Buenos Aires Ministerial Joint Statements.
When needs and priorities differ, is S&D always the solution?	Access to benefits from trade cooperation does not always need S&D – adequate process and procedures can be as effective.	<ul style="list-style-type: none"> Specific Trade Needs in TBT and SPS Agreements. Progressive liberalization in GATS. Linkage of market access and regulatory obligations in GATS.
	Labelling configurations of rights and benefits as S&D (or not S&D) is a distraction in the context of market access commitments when all parties access some ‘S&D’ – negotiations are more likely to lead to mutually beneficial bargains without the labels.	<ul style="list-style-type: none"> Negotiations on non-agricultural goods and agriculture.
	It can make sense to link market access and regulatory discipline to reach higher levels of policy commitment without resorting to S&D.	<ul style="list-style-type: none"> GATS.
When S&D is needed, what form should it take to maximize benefits?	S&D should always support engagement rather than confer exemption – it should enable rather than exempt.	<ul style="list-style-type: none"> Various NTM Agreement provisions. Agreement on Trade Facilitation. GATS.

WHAT IS THE ISSUE?	CONSIDERATIONS AND SUGGESTIONS	SOME APPROACHES/OPTIONS
	<p>Access to S&D is not usefully defined by the developing/developed categorization, but rather by individual country, sector and/or activity-related need, - possibly calibrated by prior agreement on the basis of self-executing threshold criteria.</p>	<ul style="list-style-type: none"> • Rules on export subsidies for manufactures. • Thresholds relating to countervailing duty investigations and definition of export competitiveness. • GATS.
	<p>Phase-in timeframes can be valuable, but they should be accompanied by enabling support as necessary, time-bound with appropriate flexibility, and never permanent.</p>	<ul style="list-style-type: none"> • Multiple WTO Agreements.
	<p>S&D should focus more on substance than form, on equivalence rather than uniformity – there are different ways of reaching the same place.</p>	<ul style="list-style-type: none"> • TRIPS on interoperability • TBT Agreement
	<p>The more autonomy S&D beneficiaries possess in defining the needs and timing of their obligations – combined with transparency and accountability – The greater the buy-in is likely to be.</p>	<ul style="list-style-type: none"> • Agreement on Trade Facilitation
<p>What role for technical assistance?</p>	<p>Enabling engagement, preparing parties for greater participation, and securing the attendant benefits, often depend on effective technical assistance (TA).</p>	<ul style="list-style-type: none"> • Mixed record on TA effectiveness, but this is a vital component of nurturing a converging balance of rights and obligations among members over time. • The basis for action is inscribed in various WTO Agreements.
	<p>TA should be understood as a shared benefit by givers and receivers in terms of the benefits that ensue, making the effective use of TA a shared responsibility.</p>	
	<p>TA needs should be defined by recipients, delivered by well-prepared specialists, and independently assessed for effectiveness.</p>	
<p>When and in what form should the WTO cooperate with other international bodies?</p>	<p>Forging cooperative relationships with other international and inter-governmental agencies is important for ensuring the best possible level of access to support and knowledge for all WTO members.</p>	<ul style="list-style-type: none"> • SPS Agreement. • GATS. • Customs Valuation Agreement, and others.
	<p>These relationships are vital to effective global economic governance and should be reviewed and monitored over time.</p>	<ul style="list-style-type: none"> • The record of cooperation among international agencies has improved over the years and should receive careful attention.

Additional Issues Relevant to Effective Differentiation

The points below are not necessarily specific to S&D as such, but they would support an environment conducive to cooperation that will help to resolve differences regarding the proper balance of rights and obligations among members.

FLEXIBILITY IN DECISION-MAKING

An effective negotiating function is crucial to any attempt to foster inclusiveness and establish an appropriate balance of rights and obligations. As noted in the previous subsection, negotiations among configurations comprising less than the full membership can facilitate the discovery of opportunities. Flexibility here, while in the eyes of many is essential for progress, could also pose a threat to the integrity of multilateralism and the WTO trading system if initiatives by subsets of members fail to observe strict conditions of transparency, inclusiveness (discussions and negotiations open to all WTO members) and non-discrimination (MFN application of outcomes).

ENRICHING THE DELIBERATIVE FUNCTIONS OF THE WTO

More attention should be paid to deliberative exercises in the WTO that improve mutual understanding outside a negotiating context. An example of this, once again, is the treatment of Specific Trade Concerns in the TBT and SPS Committees. The Trade Policy Review Mechanism is another example of how opportunities can be created for non-litigious discussions that can sometimes lead to better mutual appreciation of members' needs and interests. The TPRM can also help members to acquire a better overview of the totality of their trade policies and where these might fit into a broader domestic policy framework.

TRANSPARENCY IS CRUCIAL

Sound policy-making and effective trade cooperation depend heavily on transparency and the accountability associated with it. The WTO has not done as well as it should in this area, notably in respect of notification obligations. Improvements here would also contribute to a better environment on the S&D front. Some members are likely to need support in meeting their notification obligations.

Appendix 1:

Chronology of Main Events

- 1948** ENTRY INTO FORCE OF GATT, WITH THE PROTOCOL OF PROVISIONAL APPLICATION signed by 23 parties, and negotiate on reducing tariffs affecting US\$10 billion of trade (45,000 tariff concessions).
- 1949** ANNECY ROUND – 34 parties negotiate on reducing tariffs on some 5,000 tariff lines.
- 1950-51** TORQUAY ROUND – 34 parties negotiate on reducing tariffs on some 8,700 tariff lines.
- 1954-55** REVIEW SESSION – amendment of the GATT Preamble and entry into force of Parts II and III of the General Agreement, supplementing the initial provisions of GATT on MFN and tariff schedules.
- 1956** GENEVA – 22 parties negotiate on reducing tariffs affecting US\$2.5 billion and oversaw the admission of Japan into the GATT.
- 1958** THE HABERLER REPORT – recognizes, among other things, that protection levels in agriculture and tariff escalation practices by developed countries adversely affected the growth of developing countries.
- 1960-61** DILLON ROUND – 45 parties negotiate on reducing tariffs affecting US\$4.9 billion of trade.
- 1962** LONG-TERM ARRANGEMENT ON COTTON – agreement exempting certain exports of cotton textiles from MFN and the GATT prohibition on quotas.
- 1964-67** KENNEDY ROUND – 48 parties negotiate on reducing tariffs affecting US\$40 billion of trade. The first Agreement on Anti-Dumping also enters into force.
- 1965** INTRODUCTION OF GATT PART IV on Trade and Development, containing best-endeavours provisions to foster the trade of developing countries and spells out the principle of non-reciprocity.
- 1971** First GATT waivers from MFN allowing parties to introduce the GENERALIZED SYSTEM OF PREFERENCES FOR DEVELOPING COUNTRIES.
- 1973-79** TOKYO ROUND – 102 parties negotiate on reducing tariffs affecting US\$300 billion of trade. Non-tariff measure agreements are established on anti-dumping (modified from Kennedy Round agreement), customs valuation, import licensing, subsidies and countervailing measures and technical barriers to trade. Plurilateral (discriminatory) agreements established on government procurement, trade in civil aircraft, dairy products and bovine meat. Framework agreements, including:
THE ENABLING CLAUSE (making preferences permanent, providing for more favourable treatment on non-tariff measures, relaxing provisions on preferential trade agreements among developing countries, recognition of least-developed country category, and spells out notion of 'graduation');
Relaxes existing balance-of-payments provisions for developing countries;
Relaxes existing provisions on developing country safeguard actions for development purposes;
Elaborates an Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance;
Establishes a Sub-Committee of the Committee on Trade and Development to examine protective measures affecting imports from developing countries.
- 1974** The Multi-Fibre Arrangement (MFA) to replace earlier derogations of MFN and the prohibition of quotas.
- 1986-93** Uruguay Round – 123 parties negotiate on reducing tariffs by about 40 per cent on average. Creates the World Trade Organization (WTO), with all GATT contracting parties becoming members under a 'single undertaking' arrangement – enters into force in 1995 with 128 founding members. Establishes the General Agreement on Trade in Services (GATS). Establishes the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Establishes the Agreement on Agriculture and new Agreements on the Application of Sanitary and Phytosanitary Measures; Trade-Related Investment Measures; Pre-shipment Inspection; and Safeguards. Also establishes the Agreement on Textiles and Clothing which phases out the MFA in ten years (2005).

- Revises the Tokyo Round non-tariff measure agreements.
Establishes an Understanding on Rules and Procedures Governing the Settlement of Disputes.
The results also include Understandings, Decisions and Declarations on a wide range of issues.
- 1996 Singapore Ministerial Conference – stock-taking meeting, but also established working groups on trade and investment, trade and competition, and transparency in government procurement, as well as instructing the Council on Trade in Goods to examine the question of Trade Facilitation (known as the ‘Singapore Issues’). The signature by 70 WTO Members of the Fourth Protocol to the GATS concluding the negotiations on basic telecommunications.
- 1997 The Information Technology Agreement (ITA), where 40 governments agree to eliminate tariffs on computer and telecommunication products on a MFN basis. The signature by 71 WTO Members of the Fifth Protocol to the GATS concluding the negotiations on financial services.
- 1999 Seattle Ministerial Conference collapses, failing to launch new negotiations amid large-scale anti-WTO demonstrations.
- 2001- Launch of the Doha Round, which has not been completed. China joins the WTO.
- 2003 Cancun Ministerial Conference mid-term review collapses. It fails to launch negotiations on trade and investment, trade and competition, and transparency in government procurement. The meeting ends without a result and a Ministerial Statement calls for continuing work on the Doha Round.
- 2004 Following up on discussions at Cancun, Three of the ‘Singapore Issues’ are formally dropped from the WTO agenda – trade and competition, trade and investment, and transparency in government procurement – leaving only trade facilitation.
New frameworks are agreed for agriculture and non-agricultural market access (NAMA) negotiations.
- 2005 Hong Kong Ministerial Conference – Mostly about reaffirming commitments to the Doha Round and other WTO negotiations. Ministers agreed to plurilateral request/offer negotiations on services.
The MFA comes to an end.
- 2006 Doha Round negotiations suspended
- 2009 Seventh WTO Ministerial Conference, held in Geneva – Reaffirmation of the need to complete the Doha Round. Objective of doing so in 2010, starting with a stock-taking in the first quarter.
- 2011 Eighth WTO Ministerial Conference in Geneva – A statement from the Chairman of the Conference giving ‘political guidance’ agreed by Members for continuing the Doha Round. Members regretted that the negotiations were at an impasse and agreed to more fully explore different negotiating approaches while respecting the principles of transparency and inclusiveness.
A waiver from MFN is agreed to allow preferential treatment in favour of least-developed countries under the GATS.
- 2012 Launch of plurilateral services initiative outside the WTO (subsequently became the negotiations on the Trade in Services Agreement – TiSA, the negotiation of which is unfinished).
- 2013 Bali Ministerial Conference – A package is agreed, relating both to the WTO’s work programme and the Doha Round negotiations.
The most significant result from Bali is the Agreement on Trade Facilitation.
Other outcomes include an agriculture-related Decision on Public Stockholding for Food Security Purposes, which is an interim arrangement pending agreement on a permanent one.
- 2014 In July the adoption of TFA Protocol is delayed pending further progress on public stockholding.
By December it is possible to adopt the TFA Protocol, while the interim solution on public stockholding remains in place until a permanent arrangement is agreed upon.
- 2015 Nairobi Ministerial Conference – A decision is taken to eliminate export subsidies in agriculture.
This was the first substantive result of the Agriculture negotiations and an important step towards levelling the playing field for developing-country exporters. It is also the first fulfilment of an SDG.
The product coverage of the 1997 ITA is expanded.
The Ministerial Declaration records opposing views on continuing negotiations under the rubric of the Doha Round. It recognizes that many members reaffirm the Doha Development Agenda (DDA) and subsequent Declarations and Decisions, remaining fully committed to completing the DDA on that basis. Other members

do not reaffirm the Doha mandates or commit to completing the DDA on that basis, believing a new approach is necessary. These members do, however, retain a strong commitment to advance negotiations on remaining Doha issues, including in agriculture, NAMA, services, development, TRIPS, and WTO rules.

2017 Buenos Aires Ministerial Conference – The Conference was closed with a Statement from the Conference Chairperson on her own responsibility, noting main points emerging from the meeting. The Statement noted that discussions had taken place on agriculture, special and differential treatment, fisheries subsidies, domestic regulation in services, regulatory transparency in NAMA, and e-commerce. A Decision was taken to complete negotiations on fisheries subsidies by the 12th Ministerial Meeting in 2019. Other decisions carrying forward earlier mandates included those on e-commerce, non-violation and situation complaints in TRIPS, and work on small economies. Finally, subsets of members issued Joint Statements committing them to carry out further work on: Trade-related aspects of e-commerce (71 members); Investment facilitation (70 members); Micro, Small and Mid-Sized Enterprises – MSMEs (87 members). The Agreement on Trade Facilitation enters into force in February, having been ratified by a sufficient number of members.

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