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"Special Treatment" vs. "Equal Participation": Striking a Balance in the DOHA Negotiations

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“SPECIAL TREATMENT” VS. “EQUAL PARTICIPATION:” STRIKING A BALANCE IN THE DOHA NEGOTIATIONS

PETER LICHTENBAUM*

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INTRODUCTION

“The Uruguay Round was perhaps the last time when we could write a new set of rules the way we, the Northern countries, wanted them, and then grant[] developing countries ‘special and differential treatment’ to relieve them of the burden of the rules.”¹

This recent statement by Commissioner Pascal Lamy frames well the issue confronting developing countries, and World Trade Organization (“WTO”) Members generally, as the Doha negotiations begin.² Will the WTO continue to write market-liberalizing rules but

1. Speech of Pascal Lamy, European Commissioner for Trade, *Steeling the EU-US Relationship For the Challenges Ahead*, The Woodrow Wilson International Center For Scholars, Washington D.C. (January 25, 2002), available at <http://www.si.edu/NEWS/speeches/lamy.htm> (last visited Mar. 17, 2002); see also James L. Kenworthy, *US Trade Policy and the World Trade Organization: The Unraveling of the Seattle Conference and the Future of the WTO*, 5 GEO. PUB. POL'Y REV. 103, 104 (2000) (providing background on the development of rules within the WTO system, including the evolution of the organization from a “rich countries’ club” of twenty-two members to a large and diverse organization with more developing nations than developed states).

2. See Kenworthy, *supra* note 1, at 105-06 (describing the process of a new multilateral trade negotiation round, beginning with a Ministerial Conference that authorizes the new round and provides the ground rules for it by setting the agenda, the modalities, the staging concerns, and the obligation base addressing application and enforcement). These decisions are published in the Ministerial Declaration. Trade ministers from the WTO Member countries negotiated and issued the Ministerial Declaration during negotiations in Doha, Qatar from November 9-14, 2001. See *The Fourth Ministerial Conference (2001)* (providing list of relevant Doha Ministerial documents), available at http://www.wto.org/english/thewto_e/minist_e/min01_e/min01_e.htm (last visited Apr. 14, 2002).

exempt developing countries from those rules, either explicitly or by indefinitely delaying their “implementation” of those rules? Will the WTO instead move toward agreements in which developing countries participate fully, taking on all obligations but also ensuring that the overall balance of concessions reflects their interests? Or, can the WTO strike a balance between these paradigms of “special treatment” and “equal participation,” in a way that promotes market liberalization as well as the interests of developing countries?

Section I of this article summarizes the theoretical and historical antecedents of the “special and differential treatment” principle in the General Agreement on Tariffs and Trade (“GATT”)/WTO system, under which developing countries should receive greater market access for their products in developed country markets, while retaining the ability to protect their own “infant” industries and agricultural sectors from international competition.³ In the Uruguay Round, negotiators began to blend the “special treatment” principle with an alternative “equal participation” paradigm, under which developing countries would accept the same commitments as other WTO Members and in exchange would see their market access interests recognized by other countries.⁴ Thus, in many Uruguay Round agreements, developing countries accepted the same obligations as other WTO Members. Yet, the principle of “special treatment” remained, as developing countries were granted phase-in periods in which to comply with their obligations.⁵

Section II critiques the results of the “special treatment” principle, in operation now for over thirty years, which has not achieved sufficient market access for products of interest to developing countries and arguably has preserved internal economic inefficiencies in these states.⁶ While the Uruguay Round represented

3. See *infra* notes 11-41 and accompanying text (outlining the origins and principles of the special and differential treatment, and laying out relevant GATT provisions).

4. See MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 388 (2nd Ed. 1999) (noting Uruguay Round result wherein developing countries were given time to phase in domestic compliance with new rules, but developing countries were also asked to make general reciprocal trade liberalization commitments).

5. See *infra* notes 37-39 and accompanying text.

6. See *infra* notes 43-73 and accompanying text (explaining specifically why

an effort to address the problems of the “special treatment” approach, the resulting blend has not provided satisfactory results to developing countries. They have sought further extensions of the phase-in periods, arguing that the periods are unrealistic and arbitrary. Moreover, the Uruguay Round approach did not enable the developing countries to bargain for sufficient market access commitments from the developed countries.⁷

Section III discusses the Doha Declaration’s approach to special treatment for developing countries, summarizing the key provisions and arguing that the negotiators have an opportunity to move toward a more sophisticated combination of the traditional “special treatment” approach with the “equal participation” model.⁸ On one hand, there is a powerful argument that developing countries should receive enhanced market access for their goods, through both: (1) preferential access for goods exported by the least developed countries, and (2) making greater efforts to liberalize trade in sectors which are important to many developing countries, such as agriculture and textiles. On the other hand, there is less justification for applying special treatment to allow developing countries to maintain high levels of protection, given the demonstrated costs of this approach.⁹ Therefore, special treatment allowing market protection should only apply to a minimal number of sectors that are particularly sensitive for individual developing countries. Moreover, minimal market protection should promote greater willingness by developed countries to make improved market access offers on products of interest to developing countries.

A blend of “special treatment” with “equal participation” should result in a higher degree of market liberalization than has occurred in the past, as developing countries open their national markets to a greater degree and receive commensurate access for their export

the “special treatment” approach has not been completely effective).

7. See *infra* notes 44-56 and accompanying text (outlining market access difficulties that have arisen).

8. See *infra* notes 74-85 and accompanying text (exploring the new opportunities and describing the changed political situation that could lead to improving the balance between “special treatment” and “equal participation”).

9. See TREBILCOCK & HOWSE, *supra* note 4, at 371 (acknowledging costs of insulating developing countries’ export industries from international competition).

products.¹⁰ The Doha Declaration reflects tension between these two philosophies, and this tension will continue throughout the new round of trade negotiations, with inevitable political battles as countries maneuver for maximum advantage.

I. OVERVIEW OF “SPECIAL AND DIFFERENTIAL TREATMENT” IN THE GATT/WTO SYSTEM

A. ORIGIN OF THE PRINCIPLE

The principle of special and differential treatment has been the traditional approach of the GATT/WTO system to address inequitable distribution of wealth among its Members.¹¹ While the principle collides with another core principle of international economic law, i.e., the Most-Favored Nation clause,¹² the idea to treat small economies differently quickly emerged in the history of GATT.¹³ In the late 1940s, during the negotiations aimed at establishing the International Trade Organization (“ITO”), developing countries were concerned about:

[W]hich trade restrictions would be subjected to international control and which not. From the point of view of the less-developed country, the wealthy countries wanted freedom to use those restrictions that only they

10. See *infra* notes 135-46 and accompanying text (recommending a course of action for the negotiations and prescribing a practical balance).

11. See JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF THE GATT: A LEGAL ANALYSIS OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE*, ch. 25, 625-71 (Michie Co. 1969) (describing the origins of the special and differential treatment within the GATT system and analyzing Article XVIII and Part IV); Frank J. Garcia, *Trade and Inequality: Economic Justice and the Developing World*, 21 MICH. J. INT’L L. 975, 989-94 (2000) (describing the principles of special and differential treatment under GATT).

12. See General Agreement on Tariffs and Trade, Oct. 30, 1947, art. I, sec. IV, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT] (“[A]ny advantage, favour, privilege or immunity granted by any [WTO Member] to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other [WTO Members].”).

13. See Garcia, *supra* note 11, at 1025-26 (remarking that providing special market access violates the most-favored nation principle, but that granting this measure is fair).

were most able to use effectively while banning those restrictions that less-developed countries felt they were most able to use.¹⁴

The principle of special and differential treatment is an attempt to resolve the competing demands for trade liberalization and equitable socio-economic development.¹⁵ Although economic theory would suggest that it is in lesser-developed countries' best interest to open their markets to foreign competition, these countries wanted to protect their infant industries from the technologically advanced industries of developed nations.¹⁶ In other words, Members considered the introduction of temporary restrictions, under which developing countries could protect their economy and engage in economic growth, as politically and economically necessary.¹⁷

At the same time, developing countries sought to secure access for their products in developed countries' markets.¹⁸ Market access was seen as an adequate and desirable response to the inequality of consumer markets' among GATT Members.¹⁹ Thus, special and differential treatment has two aspects: (1) protection of developing

14. See JACKSON, *supra* note 11, at 637-38.

15. See Asoke Mukerji, *Developing Countries and the WTO: Issues of Implementation*, 34(6) J. OF WORLD TRADE 33, 35-36 (2000) (explaining that creating exceptions to the basic principles of the GATT by allowing developing countries to use temporary restrictions to safeguard their economic reserves represented a solution to these tensions).

16. See Garcia, *supra* note 11, at 989 (contrasting theory and practice, and noting that in practice, unrestricted competition in an unprotected developing country market would significantly affect unemployment and industrialization in these states, and ultimately harm export-oriented developed economies); see also Mukerji, *supra* note 15, at 36 (referring to the need for lesser-developed countries to expand their domestic industries).

17. See Mukerji, *supra* note 15, at 35-36 (justifying the exceptions to provide opportunities and a gestation period for the newly de-colonized countries to grow their economy in order to become equal participants in, and beneficiaries of, the emerging international economic order).

18. See Garcia, *supra* note 11, at 989 (explaining that in addition to benefiting from market protection measures for their markets, these nations also enjoy preferential access to developed country markets for their exports).

19. See *id.* at 1025-26 (justifying this exception to the Most Favored Nation ("MFN") principle as a fair solution to resolve tensions between developing and developed countries).

country markets; and (2) enhanced access to developed country markets.²⁰

The principle of special and differential treatment emerged partly from the rhetoric of post-colonialism. Essentially some argued that developing countries were in an unequal position due largely to the legacy of colonial oppression.²¹ In an attempt to frame the principle, Professor Garcia has proposed an analytical model based on existing liberal theories and, in particular, on John Rawls' conception of justice.²² At the international level, the principle of special and differential treatment is the translation of the concept that unequals should benefit from different treatment through the operation of redistributive mechanisms.²³ This is the egalitarian conception of justice.²⁴ The egalitarian conception of international trade postulates that without adequate resources, less-advanced economies are unable to take full advantage of their opportunities resulting from free trade. Access to certain resources is essential for these countries in order to meet their development requirements. As a result, the egalitarian conception favors an unequal or different treatment of GATT

20. See *id.* at 988-95 (describing these two categories of benefits stemming from special and differential treatment).

21. See *id.* at 982-83 (describing the economic situation of developing countries after decolonization); see also Mukerji, *supra* note 15, at 35 (identifying developing countries as former colonies, and presenting the rationale for special and differential treatment).

22. See Garcia, *supra* note 11, at 997-1002 (outlining Rawls' theory of justice and inequality); see also Frank J. Garcia, *Symposium: Global Trade Issues in the New Millennium: Building a Just Trade Order for a New Millennium*, 33 GEO. WASH. INT'L L. REV. 1015, 1027-29 (2001) [hereinafter Garcia, *Global Trade Issues*] (setting forth Rawls' theory, his use of a contractarian device in his approach, and contrasting it with Kant's doctrine of justice).

23. See Garcia, *Global Trade Issues*, *supra* note 22, at 1021, 1028-29 (noting that egalitarianism is a strand of political liberalism, and that under Rawls' theory, redistribution is a tool for creating and allocating new economic benefits as a result of advantages and wealth that would not otherwise arise in the absence of social and economic cooperation).

24. *Id.* at 1053 (contrasting egalitarianism with a libertarian concept of justice, under which just trade deals only with the formal equality of opportunity that free trade accomplishes). Under such an approach, preferential treatment as a redistributive tool would ultimately represent coercion, since the developed countries could not benefit from this treatment. *Id.*

Members depending on their state of development.²⁵ Under an egalitarian approach, wealthy Members should open their markets to imports of goods from less-developed countries, while these less-developed states have the right to postpone adoption and implementation of a wide range of disciplines imposed under the rules of international trade.²⁶

The GATT/WTO system has incorporated the redistributive conception and policies under the principle of special and differential treatment.²⁷ Within the current GATT/WTO system, there are an estimated one hundred forty-five provisions that apply this principle to various degrees.²⁸

B. BASIC GATT/WTO PROVISIONS INCORPORATING THE PRINCIPLE OF SPECIAL AND DIFFERENTIAL TREATMENT

As noted, the principle of special and differential treatment includes two broad categories of measures: market protective measures and preferential access.²⁹ For the most part, GATT 1947 originally did not distinguish between trade of developing and

25. See generally Garcia, *supra* note 11, at 1025-49 (analyzing trade and inequality, and ways to remedy the inequity).

26. At the same time, under a utilitarian type of approach, developed countries view the principle as an instrument that would stabilize the GATT system, while securing development in future markets.

27. See Garcia, *Global Trade Issues*, *supra* note 22, at 1051 (emphasizing that special and differential treatment is at the center of the GATT-WTO approach to address the problem of inequality); see also *infra* note 28 and accompanying text (detailing the implementation of the special and differential treatment doctrine in specific agreements).

28. See Committee on Trade and Development, *Implementation of Special and Differential Treatment Provisions in the WTO Agreements and Decisions*, at 3, WT/COMTD/W/77 (Oct. 25, 2000) [hereinafter *Implementation of Special and Differential Treatment*] (noting that the 145 provisions are spread across several Agreements, Understandings and Ministerial Decisions, and that of the one hundred seven provisions the Member states adopted, only twenty-two apply to least-developed country Members), available at http://docsonline.wto.org/gen_search.asp (last visited Mar. 23, 2002); see also TREBILCOCK & HOWSE, *supra* note 4, at 388-94 (illustrating examples of special and differential treatment for developing countries within the WTO Agreements).

29. See Garcia, *supra* note 11, at 989 (delineating the two categories of benefits under the special and differential treatment concept).

developed countries.³⁰ However, beyond the limited tariff concessions developing countries made under Article II of GATT, Article XVIII—"Government Assistance to Economic Development"—authorized less advanced economies to "deviate temporarily" from the provisions of the GATT.³¹ Such deviations include tariff increases to foster infant industries, quantitative restrictions for balance of payments purposes,³² any measures necessary to promote a particular industry, and, generally, a permission to deviate from any GATT rule for countries in transition. Under Article XVIII, developing countries thus could take virtually any measure to protect their infant industries. Thus, developing countries enjoy wide discretion under GATT when implementing development policies. Developing countries have used market protection measures to shield their industries from foreign competition and, in particular, from highly competitive industries located in developed countries.³³

In addition to these market protective measures, developing countries have argued that their products should receive preferential access in developed country markets.³⁴ The principle of lower tariff rates for imports into industrial countries from developing countries resulted in two significant initiatives in the 1960s. By 1965, the

30. See Jose E. Alvarez & David W. Leebron, *Symposium: The Boundaries of the WTO*, 96 AM. J. INT'L L. 5, 9 (Jan. 2002) (explaining that due to the original intent that GATT was to be a temporary or interim agreement until the International Trade Organization was approved, many issues including economic development were not incorporated into the original GATT).

31. See GATT, *supra* note 12, art. II (authorizing Members to accord MFN treatment to goods listed in annexed schedules), *id.* art. XVIII (authorizing flexibility in tariff concessions, ability to impose quotas, and provision of government assistance by developing countries for economic development purposes).

32. See *id.* art. XII (outlining GATT legal restrictions that may be imposed "to safeguard [a Member's] external financial position and its balance of payments...").

33. See Frieder Roessler, *Domestic Policy Objectives and the Multilateral Trade Order: Lessons from the Past*, 19 U. PA. J. INT'L ECON. L. 513, 516 (1998) (noting developing countries invoked Article XVIII as a legal justification for import substitution); see also *id.* at 519-20 (arguing that the "cause of development was not served by releasing developing countries from their GATT obligations").

34. See *id.* at 519-20 (noting development initiative in the 1960s and 1970s wherein developing countries lobbied for tariff preferences).

addition of Part IV provided principles and objectives for trade and development.³⁵ While hortatory for the most part, Part IV includes specific commitments by developed countries to “accord high priority to the reduction and elimination of trade barriers” and to “refrain from introducing, or increasing the incidence of, customs duties or non-tariff barriers” on products of particular export interest of less-developed countries.³⁶

Shortly thereafter, the GATT contracting parties authorized a general system of preferences in 1971 for a ten-year period.³⁷ The general system of preferences enabled developed countries to accord more favorable treatment to products originating from developing countries. Then during the Tokyo Round negotiations, which concluded in 1979, the parties adopted the so-called “Enabling Clause,” which authorized developed countries to depart from their MFN obligations in according “differential and more favorable treatment to developing countries, without according such treatment to other Contracting Parties.”³⁸ The Enabling Clause does not impose an obligation on developed countries to accord differential treatment to exports from developing countries. It merely allows developed countries to depart from their MFN obligations to accord preferential treatment on products from developing countries.

With the adoption of the Uruguay Round Agreements, the concept of special and differential treatment evolved further, and has been

35. See Protocol Amending the General Agreement on Tariffs and Trade To Introduce a Part IV on Trade and Development, Feb. 8, 1965, GATT, B.I.S.D. (13th Supp.) 1-11 (1965) (acknowledging the importance of trade to economic development in developing countries and especially the importance of export oriented industries to development and the need to facilitate development of export industries).

36. GATT, *supra* note 12, art. XVII(1)(b) and (c).

37. See Generalized System of Preferences, June 15, 1971, GATT B.I.S.D. (18th Supp.) at 24-26 (1972) (setting forth the terms of the preferential arrangements). This is the so-called waiver to the MFN clause.

38. See Differential and More Favorable Treatment: Reciprocity and Fuller Participation of Developing Countries, Nov. 28, 1979, GATT B.I.S.D. (26th Supp.) at 203-05 (1980) [hereinafter Differential and More Favorable Treatment] (recording the decision of the Contracting Parties to allow differential and more favorable treatment for developing countries because of their special economic situation, setting out the terms and purposes of such treatment, and noting that developed countries do not expect reciprocity).

adopted in one form or another in virtually all of the WTO Agreements. While a listing of these provisions is beyond the scope of this article, the WTO Secretariat has proposed a useful typology of these provisions.³⁹ The major innovation resulting from the Uruguay Round negotiations was the adoption of identical commitments applying to all Members irrespective of their level of development, but with longer implementation periods for developing country Members.⁴⁰ Because the Uruguay Round was agreed as a single package, with a greatly expanded scope, developing countries lacked the capacity to integrate and implement the results of the round of negotiations immediately. With respect to developing countries, capacity building and technical assistance were necessary for the application and implementation of this new set of rules.⁴¹ Examples of deferred application of WTO disciplines for developing countries include Article 27.4 of the Subsidies Code, which allows developing countries to phase out all export subsidies within an eight-year period, and Article 20 of the Customs Valuation Code, which provides that developing countries may delay application of the code for a period of five years from the date of entry into force of the WTO.⁴² Thus the Uruguay Round essentially added a third concept—

39. See *Implementation of Special and Differential Treatment*, *supra* note 28 (describing in detail the implementation of the special and differential treatment provision in numerous agreements, including the Agreement on Agriculture, the Agreement on Textile and Clothing, and the Agreement on Technical Barriers to Trade, among others). The Secretariat made the following distinctions: (i) provisions aimed at increasing the trade opportunities of developing country Members (e.g., Enabling Clause and Part IV of GATT); (ii) provisions under which WTO Members should safeguard the interests of developing country Members (e.g., Article 15 of the Agreement on the Implementation of Article VI of GATT, Articles 27.1 and 27.15 of the Subsidies Code and Article 10.1 of the SPS Agreement); (iii) flexibility of commitments, of action, and use of policy instruments (e.g., GATT Article XVIII and the Enabling Clause); (iv) transitional time periods (i.e., eighteen provisions across eight agreements establish time-bound exemptions from disciplines otherwise applicable); (v) technical assistance and (vi) specific provisions for least developed countries. *Id.*

40. See Kenworthy, *supra* note 1, at 105 (stating that during the Uruguay Round, and even before, the developed nations acknowledged that the economic needs of developing countries required special and differential treatment, including delayed phase-in implementation of the new rules).

41. See *id.* (noting that technical assistance was designed to help developing countries comply with the new rules).

delayed implementation—to the market access and market protection components of special and differential treatment, discussed above.

II. THE CRITIQUE OF THE SPECIAL AND DIFFERENTIAL TREATMENT PRINCIPLE

The principle of special and differential treatment is criticized for its lack of implementation and its failure to achieve concrete results for developing countries' economies.⁴³ The following section addresses some of the most important issues raised by the existing rules on special and differential treatment by focusing on the three current aspects of the principle: market access, market protection, and implementation.

A. MARKET ACCESS

As a general matter, many of the special and differential treatment provisions relating to market access are hortatory and do not bind developed country Members. Because their language does not direct any action, but merely encourages or promotes active participation of industrialized country Members in the development efforts of developing countries, many provisions effectively are “soft law;” i.e., a WTO dispute settlement panel cannot review any alleged violation of these provisions.⁴⁴

Market access provisions are essentially handled through the general system of preferences (“GSP”).⁴⁵ While, from a conceptual

42. See The Uruguay Round Final Act: Full Texts (1994) (listing all the WTO Agreements), at http://www.wto.org/english/docs_e/legal_e/final_e.htm.

43. See General Council, *Proposal for a Framework Agreement on Special and Differential Treatment*, at 3, WT/GC/W/442 (2002) [hereinafter Framework Agreement Proposal] (stating that provisions have fallen short of providing necessary flexibility to developing countries to facilitate economic development, and implying that the objectives sought were not achieved), available at http://docsonline.wto.org/gen_search.asp (last visited Mar. 23, 2002).

44. See Gustavo Olivares, *The Case for Giving Effectiveness to GATT/WTO Rules on Developing Countries and LDCs*, 35(3) J. OF WORLD TRADE 545, 547-48 (2001) (noting “soft law” approach in WTO provisions relating to developing countries and commenting that these provisions are essentially unenforceable).

45. See Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries, Nov. 28, 1979, GATT B.I.S.D. (26th Supp.

point of view, a system of preferences should ensure that developing countries become full participants in world trade through their growing share of exports; the GSP programs have been flawed in their implementation.

First, because the GSP program is primarily administered by the granting state, it is “particularly vulnerable to manipulations by domestic industries since their products compete directly with those of developing countries.⁴⁶ For instance, under U.S. law, characteristics of the GSP include unilateralism, conditionality and the exclusion of the articles deemed “import sensitive.”⁴⁷ The unilateral aspect of the program subjects it to annual review,⁴⁸ and makes it unstable and more dependent upon domestic considerations. The conditionality attached to granting the GSP status to a developing country includes, among other things, an evaluation of the beneficiary’s level of protection of intellectual property rights,⁴⁹ equitable market opening to U.S. products and investments,⁵⁰ and assurance that the beneficiary will not engage in unreasonable export practices.⁵¹ This conditionality can discourage or hurt exporters of the beneficiary country to the extent that they could lose their

203-05 (authorizing GSP programs amongst GATT Members for benefit of developing countries).

46. See Garcia, *supra* note 11, at 1030 (discussing the weaknesses of unilateral implementation of special and differential treatment, and citing U.S. preferential trade practice as an example of a poorly administered program).

47. See 19 U.S.C. § 2463(b) (2001) (stating the articles that the President cannot designate as eligible for GSP treatment, include articles that are import sensitive, and certain agricultural products); JOHN H. JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 1131-36 (West 3rd ed. 1995) (outlining the U.S. GSP scheme and the criteria used for detailing what articles are not eligible for GSP treatment).

48. See 19 U.S.C. § 2465 (2002) (providing the date of termination of special and beneficial treatment as Sept. 30, 2001).

49. See 19 U.S.C. § 2462(c)(5) (2001) (listing the extent to which a country provides adequate and effective protection of intellectual property rights as a factor affecting the designation of a country as a beneficiary developing country).

50. See 19 U.S.C. § 2462(c)(4) (2001) (listing the extent to which a country provides equitable and reasonable access to the markets and basic commodity resources, as well as assurance to the United States that it will refrain from engaging in unreasonable export practices as a factor affecting the designation of a country as a beneficiary developing country).

51. *Id.*

investments if the grantor state—in this example the United States—withdraws its GSP benefits. In addition, the exclusion of import sensitive products that are of particular interest to developing countries protects less-competitive industries in the granting state. As a result, rather than building the trade relationship on the basis of comparative advantages, the exclusion of import sensitive products renders the system less attractive to developing countries while imposing higher prices on consumers in the granting state.

Second, the general system of preferences has become less attractive because there have been successive negotiating rounds, which have resulted in significant tariff reductions.⁵² The economic benefits resulting from preferential access elude developing countries as tariff barriers among industrialized nations are waning. This puts developing countries in the awkward position of resisting global trade liberalization that would undercut the value of existing preferential treatment.

Third, the “enabling clause” discussed earlier was counterbalanced by the “graduation clause,” which anticipated that developing countries would accept greater obligations under GATT as their economic situations improved.⁵³ The graduation clause took the form of reduced access to export markets once industrialized nations found that the developing country had reached a certain level of competition with domestic products.⁵⁴ Finally, Part IV of the GATT was virtually inoperative as the United States and the European Union did not meet their commitments to refrain from imposing

52. See ORG. FOR ECON. COOPERATION AND DEV., OPEN MARKETS MATTER: THE BENEFITS OF TRADE AND INVESTMENT LIBERALIZATION 31 (OECD ed. 1998) (noting reduction of tariffs from an average of forty percent in 1947 to an average of four percent during the Uruguay Round).

53. See Differential and More Favorable Treatment, *supra* note 38, at 204 (allowing developed countries to modify treatment of developing countries, in response to changes in development and financial needs); see also 1982 Report by the Secretariat General of UNCTAD, Assessment of the Results of the Multilateral Trade Negotiations, UNCTAD Doc. T/B/778/Rev.1, at 29.

54. See, e.g., 19 U.S.C. § 2463(c)(2) (2001) (permitting a withdrawal of special treatment, under U.S. law, to developing countries when the President decides the country has exported to the United States).

additional non-tariff barriers on products of primary interest to developing countries under Article XXXVII of GATT.⁵⁵

In light of the foregoing, during the Uruguay Round negotiations, large developing countries were inclined to abandon GSP methodology because such preferences did not provide them with meaningful access to developed country markets.⁵⁶

B. MARKET PROTECTION

Developing countries made heavy use of the authority in Articles XII and XVIII of the GATT to deviate from GATT principles in the past and to limit the scope and margins of their tariff concessions.⁵⁷ The non-reciprocity in the level of concessions and the large flexibility accorded to developing countries to depart from GATT disciplines can be criticized on two grounds. First, developing countries have been unable to obtain significant concessions on products of interest to them from developed economies by failing to participate in the exchange of reciprocal reductions in trade barriers.⁵⁸ For example, industrialized countries singled out textiles and agriculture, which are important products for developing countries, and subjected these industries to extremely high import

55. See GATT, *supra* note 12, art. XXXVII (outlining developed countries' commitment to "accord high priority" to reducing and eliminating barriers to products of particular interest to developing countries and to take developing countries' trade interests into account when considering other measures permitted under the GATT agreement).

56. See Michael Rom, *Some Early Reflections on The Uruguay Round Agreements As Seen From The Viewpoint Of a Developing Country*, 28(6) J. OF WORLD TRADE 5, 8 (1994) (arguing that many large developing countries opted for individual concrete negotiations and rejected the "handouts" of preferential negotiations, from which developed nations could unilaterally withdraw).

57. See Chantal Thomas, *Balance-of-Payments Crises in the Developing World: Balancing Trade, Finance and Development in the New Economic Order*, 15 AM. U. INT'L L. REV. 1249, 1256 (2000) (explaining that developing countries often used Article XII to implement quantitative safeguards to protect against external financial situations and that Article XVIII allows a large amount of discretion for developing countries to impose trade restrictions).

58. See Constantine Michalopoulos, *Developing Country Strategies for the Millennium Round*, 33(5) J. OF WORLD TRADE 1, 25 (1999) (arguing that empirical and analytical studies suggest that developing countries' use of rights exempting them from WTO provisions negatively affects their trade and development).

restrictions.⁵⁹ At the same time, developing countries had to accept the initiative of the “Quad” countries (the United States, the European Union, Japan, and Canada) to include intellectual property rights, services, and, to a limited extent, investment in the Uruguay Round negotiations.⁶⁰

The second critique of these protections is that they allow developing countries to distort domestic resource allocation and encourage rent seeking and waste, as well as adversely impacting growth in productivity and sustainable development.⁶¹ Not only have those market protection measures been inefficient in terms of economic development, but also trade restrictions imposed for balance-of-payments purposes have not had the same efficacy as macroeconomic policies, such as exchange rate adjustments.⁶²

The critique of market protection measures shows that active involvement in tariff reduction negotiations could place developing countries in a better position to obtain major concessions from developed countries in areas of importance to developing countries. In other words, the long-term interests of developing countries may be better served if they were able to improve their negotiating position by offering to liberalize their economies and open their markets to import competition. In this way, developing countries could bargain more effectively to obtain market access on products of interest to their economies.⁶³

59. See Mukerji, *supra* note 15, at 40-48 (discussing the significant negative impact of restrictions on textiles and agriculture has on developing countries).

60. See Phillip M. Nichols, *Forgotten Linkages – Historical Institutionalism and Sociological Institutionalism and Analysis of the World Trade Organization*, 19 U. PA. J. INT'L ECON. L. 461, 461 (1998) (arguing that although the WTO is premised on equal participation, the true construct is one based on historic institutionalism, where the Quad countries set the agenda and developing countries merely play a reactive role in negotiations).

61. See Michalopoulos, *supra* note 58, at 25 (proposing this critique to challenge the reasoning for developing countries' exemption from WTO disciplines).

62. See *id.* at 26 (suggesting that macro-economic measures such as exchange rate adjustments are more effective because unlike protections, these measures do not adversely impact resource allocation and productivity).

63. See David A. Gantz, *Failed Efforts To Initiate The “Millennium Round” in Seattle: Lessons For Future Global Trade Negotiations*, 17 ARIZ. J. INT'L & COMP. L. 349, 351-52 (2000) (suggesting that the goals of developing nations will

C. IMPLEMENTATION

Finally, in the area of implementation, the transition periods negotiated under the Uruguay Round have some appeal because all Members have made the same commitment while allowances have been made for the technical implementation difficulties that developing countries will face in attempting to meet their commitments. Developing countries, however, now view the transition periods as unrealistic and not commensurate with the concurrent need for capacity building to implement the agreements. Developing countries have noted that special and differential treatment “underwent a dramatic transformation in the Uruguay Round Agreements.”⁶⁴ Consequently, developing countries have argued that the different phase-in periods, provided for developing countries in the Uruguay Round Agreements, fail to recognize their specific development needs.⁶⁵ Today, some of the implementation periods have already expired and few developing countries have been able to fully integrate the results of the Uruguay Round.⁶⁶ While the United States favored extensions on a case-by-case basis, developing countries have been pressing the case for an additional blanket grace period to implement the newly adopted trade agreements.⁶⁷

Although developing countries consider the technical assistance provisions of the Uruguay Round to be of critical importance, they continue to view such provisions as a virtual dead letter. For instance, in the area of technical barriers to trade (“TBT”), little effort has been made to implement the commitment to help

likely be contingent upon reciprocal concessions to the European Union and the United States).

64. See Framework Agreement Proposal, *supra* note 43 (noting that the concept of special and differential treatment shifted from addressing developmental problems to implementation problems).

65. See *id.* (noting the change in focus meant, among other things, that the same principles would be applicable to developing countries at different stages of development when determining the transitional period for technical assistance).

66. See Gantz, *supra* note 63, at 363 (remarking that developing countries were concerned with failing to meet the January 2000 deadline for TRIPS, TRIMS, and Customs Valuation Agreement).

67. See *id.* at 352 (reporting that the United States declined to discuss extending blanket grace periods for the implementation of trade agreements).

developing countries tackle the special difficulties they face in the formulation and application of standards.⁶⁸ While such technical assistance may not be “special and differential treatment” as such, technical assistance is critically necessary if developing countries are to assume the full obligations of WTO membership. The lack of ability to comply with existing commitments is frequently cited as a reason why developing countries are reluctant to take on new commitments.

Moreover, due partly to the extended phase-in of WTO commitments for developing countries, as well as their unwillingness to make strong commitments in certain areas of interest to the developed countries (e.g., services),⁶⁹ the Uruguay Round agreements did not achieve significant near-term market access for developing country products. The Uruguay Round did produce one agreement that developing countries perceived as significantly reducing trade barriers in developed country markets. The Agreement on Textiles and Clothing provides for the phasing-out over a ten year period of the existing quotas and tariff-rate quotas on

68. See Agreement on Technical Barriers to Trade (TBT), art. 11, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A (Apr. 15, 1994) (outlining technical assistance commitments to developing countries in the area of standards), available at http://www.wto.org/english/docs_e/legal_e/final_c.htm. See generally OXFAM Report: Rigged Rules and Double Standards: Trade, Globalization, and the Fight Against Poverty, Ch. 9 (Apr. 2002) (noting the lack of technical assistance for developing countries, which detracts from their ability to participate in development of trade rules), available at <http://www.maketrade.org/stylesheet.asp?file=03042002121618&cat=2&subcat=5&select=1>. But see Press Release, WTO, Moore Welcomes Oxfam Report But Cites Omissions and Errors (Apr. 11, 2002) (acknowledging the need to increase capacity of developing countries by providing technical assistance and noting that the WTO is currently working with the World Bank, UNCTAD, the U.N. Development Programme and the IMF to that end), available at http://www.wto.org/english/news_e/pres02_e/pr285_e.htm. Developing countries lack the minimum infrastructure to grapple with the multiplication of international standards; thus, developing countries experience great difficulties in ensuring that their products comply with such standards. As a result, in addition to high tariff barriers on products that are of particular interest to developing countries, they also must confront technical barriers to trade.

69. This reluctance to liberalize trade in services has continued after the Uruguay Round. See 11 WASH. TRADE DAILY, Feb. 6, 2002, at 2 (reporting remarks of Dr. Supachai Panitchpakdi, incoming Director General of the WTO, who said developing countries have concerns about opening their services markets to developed countries without special conditions).

textile products in the United States, the European Union, Canada and Norway.⁷⁰ While developing countries have criticized the lack of adequate implementation of this agreement,⁷¹ to a large extent the problem is that the Textiles Agreement simply did not provide for definitive near term market access. In the area of agriculture, which is another important product area for developing countries, the Uruguay Round's Agreement on Agriculture⁷² is generally viewed as containing little discipline on developed country export subsidies.⁷³

In sum, the Uruguay Round approach, like the traditional GATT "special treatment" approach, has been unsuccessful in promoting developing countries' interests. Over the past thirty years of its existence, the principle of "special and differential treatment" has not achieved enough for developing countries in terms of their economic growth and access to markets. The critique of the special and differential treatment provisions raises the question as to whether there is a better alternative or a modification of approach to the special and differential treatment concept that could yield more encouraging results for developing countries.

III. FROM SEATTLE TO DOHA: THE RISE OF "EQUAL PARTICIPATION?"

The progression from the 1999 WTO Ministerial meeting in Seattle to the 2001 meeting in Doha shows the dramatic increase in the importance and self-confidence of developing countries within

70. See Agreement on Textiles and Clothing, art. 2.8, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A (Apr. 15, 1994) (committing Members to gradually phase out restrictions on textiles over a ten year period), available at http://www.wto.org/english/docs_e/legal_e/final_e.htm.

71. See World Trade Organization Annual Report 2001, at 31 [hereinafter WTO Annual Report] (noting the slow pace of elimination of quotas on textiles and clothing), at https://secure.vtx.ch/shop/boutiques/wto_index_boutique.html (last visited Apr. 15, 2002).

72. See Agreement on Agriculture, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A (Apr. 15, 1994), available at http://www.wto.org/english/docs_e/legal_e/final_e.htm.

73. See Mukerji, *supra* note 15, at 47 (pointing out that, although the majority of developing countries are unable to provide export subsidies, developed countries may utilize such subsidies). Mukerji notes that the European Union spends seven billion U.S. dollars in export subsidies for agriculture. *Id.* at n.40.

the WTO negotiating framework. The Seattle talks broke down, in part, because of the divergence between developing countries' perception of their increased role, and the developed countries' more traditional understanding of WTO negotiations as a forum where deals could be struck among the key Members. During the Doha negotiations, however, all participants appreciated that developing countries were central to the launch of a new round. This appreciation resulted in the Doha Declaration repeatedly acknowledging the importance of developing country interests.⁷⁴

The stage is thus set for a critical juncture in the world trading system. While it is clear that developing countries are now central to the ability of the WTO to move forward, it is unclear as to how developing countries will use this influence. Will they seek to maintain existing market protections, under the rubric of "special treatment?" If so, will this strategy lead the developed countries to refuse the market access concessions that developing countries demand? Or, will developing and developed countries be able to strike a liberalizing balance, wherein developing countries' market access interests are given special priority and in exchange developing countries commit to significant liberalization of their national markets? The success of the negotiations launched in Doha is likely to turn on the unpredictable answers to these (and other) questions.

In Seattle, developing countries came for the first time with a definite agenda that placed conditions on their participation in a next round of trade liberalization.⁷⁵ They articulated their wish list on logistical and budgetary shortcomings that hindered their full participation in the WTO implementation process.⁷⁶ Not only did they express concern about the need to make the special and differential provisions more effective, they also requested the

74. See Doha Ministerial Declaration (Nov. 14, 2001), WT/MIN(01)/DEC/W/1 [hereinafter Doha Declaration], available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm.

75. See Supachai Panitchpakdi, *The Evolving Multilateral Trade System In The New Millennium*, 33 GEO. WASH. INT'L L. REV. 419, 429 (2001) (explaining that developing countries prepared a definite agenda in a string of meetings prior to the Seattle Conference).

76. See Kenworthy, *supra* note 1, at 108 (noting that because of the lack of technical assistance, developing countries have been unable to cope with the short time-limits to implement the agreements).

elimination of trade barriers and distorting trade practices in areas of particular interest to them.⁷⁷ In general, developing countries worked in a focused and unified manner that greatly increased effectiveness.

By contrast, the United States and the European Union were not only unable to agree on a common list of items for inclusion in the next round of negotiations,⁷⁸ but they articulated priorities that either conflicted directly with or failed to address developing countries' demands. For instance, the European Union was unwilling to accept any discussion on agricultural price supports and export subsidies, while it was seeking to include competition and investment in the agenda.⁷⁹ The United States proposed a linkage between trade and minimum environmental and labor standards (which developing countries saw as potentially jeopardizing their market access), but refused to discuss broader extension of the phase-in periods for implementation or to include the Antidumping Agreement in the discussion.⁸⁰

In addition to the substantive divergences of agenda, the Seattle Ministerial meeting was the theatre of growing frustration among developing countries based on their perception of exclusion from the negotiations.⁸¹ During the meeting, developing countries insisted that

77. See, e.g., Daniel D. Bradlow, *Global Trade Issues In The New Millennium: 'The Times They Are A-Changin': Some Preliminary Thoughts On Developing Countries, NGOs and The Reform Of The WTO*, 33 GEO. WASH. INT'L L. REV. 503, 504 (2001) (listing developing countries' priorities as obtaining relief in the implementation of Uruguay Round agreements; opening developed country markets in the areas of textiles and agriculture; and ensuring that the WTO was sensitive to problems concerning development).

78. See *Rebuild WTO Before Trade Round - Jamaica's Bernal*, 8 WASH. TRADE DAILY, Dec. 16, 1999, at 1 (noting Jamaican Amb. Bernal remarks that Seattle meeting was "politically premature" in part because major players like the United States and the EU and Japan had not developed any consensus on an agenda).

79. See Gantz, *supra* note 63, at 553-54 (stating EU was unwilling to discuss any meaningful reductions in agricultural price supports).

80. See *id.* at 353-54 (declaring that the United States failed to execute a well-planned negotiation, due to conflicting domestic political concerns).

81. See Peter Lichtenbaum, *Dispute Settlement and Institutional Issues*, 3 J. OF INT'L ECON. L. 173, 175 (2000) (reporting that representatives from various developing nations sent communiqués condemning the lack of transparency in the decision making process during the Seattle Conference).

they be admitted to participate in “green room”⁸² conferences held parallel to the meetings of the working groups.⁸³ They explicitly warned that they would block any ministerial declaration that had been reached without their full participation.⁸⁴ Developing nations’ perception of exclusion, based on the reality that developed country delegations believed they could reach a “backroom deal,” materially undermined the effectiveness of the talks.⁸⁵

Perhaps because of the Seattle failure, the leading industrialized nations have revised their attitude towards building consensus for further trade liberalization. In Seattle, the United States and the European Union came with not enough to bargain with in exchange for including issues such as investment, competition, environment, and labor standards as new issues for negotiations. Conscious of the need to reach a consensus for a new round of negotiations, especially in the aftermath of the September 11th terrorist attacks, developed countries have opened their ears to voices of the developing world.

IV. THE DOHA DEVELOPMENT AGENDA: MIXED MESSAGES

Building on the lessons learned at Seattle, the kickoff of the Doha negotiations, at least rhetorically, saw the interests of developing

82. During the Uruguay Round negotiations, contentious issues were discussed and resolved among key GATT Members in a conference room appended to the Office of the Director-General, which was dubbed the “green room.”

83. See Jeffrey L. Dunoff, *The WTO In Transition: Of Constituents, Competence and Coherence*, 33 GEO. WASH. INT’L L. REV. 979, 981 n.2 (reporting that developing countries were not satisfied with the Conference Chairs’ attempts to create working groups allowing more participation by developing countries because they were still unable to take part in major aspects of parallel negotiations); see also Markus Krajewski, *Democratic Legitimacy and Constitutional Perspectives of WTO Law*, 35(1) J. OF WORLD TRADE 167, 169 (2001).

84. See Dunoff, *supra* note 83, at 981 n.2 (noting that developing countries demanded more participation in negotiations, and took a decidedly more “proactive” role in the Seattle negotiations).

85. See J.B. Penn, *Doha Ministerial: A New Impetus for Multilateral Agricultural Negotiations*, 7 ECON. PERSPECTIVES 9, 10 (Jan. 2002) (reporting that many studies concluded that there was a strong correlation between the level of participation of countries in negotiations with the level of benefits resulting from trade).

countries squarely in the center of negotiations. As in Seattle, the developing countries were able to agree on a specific agenda of issues that they wanted the Conference to address.⁸⁶ The nearly simultaneous accession of China, which has allied itself with developing countries, lent further weight to developing countries' ability to participate as equally influential actors in the shaping of trade negotiations and rules.⁸⁷

What remains to be seen is how developing countries will exert this influence and how developed countries will respond. This issue should be viewed in light of the fact that even before China's accession to the WTO, developing nations made up approximately seventy five percent of the WTO's membership.⁸⁸ Some developing nations have indicated that they will seek to extend special and differential treatment provisions, as well as create new special treatment provisions.⁸⁹ Other developing countries, however, may be prepared to accept significant new obligations, if such obligations lead to genuine market liberalization in sectors important to their economies. This section reviews the approach taken in the "Doha Declaration" and discuss the prospects for the new negotiations.

86. See Rubens Ricupero, *Development Implications of Doha*, 29 SOUTH BULLETIN 17, 18 (Feb. 15, 2002) (asserting that developing countries successfully unified their influence in the two years since Seattle by ensuring the inclusion of implementation items from their pre-Seattle proposals).

87. See Daniel Pruzin, *Developing Countries Set Out Common Position for Doha Meeting*, 18 Int'l Trade Rep. (BNA) 1856 (Oct. 4, 2001) (asserting that Group 77, also known as G-77, has support of 130 countries along with China). As well as participating individually in Doha and in negotiations leading up to Doha, developing countries effectively engaged in consensus building amongst themselves. Groups that participated (and continue to participate) in consensus building and negotiating include the "African Group", the "Like Minded Group of Developing Countries," and the Group of 77. The active "Cairns Group" of agricultural exporters also includes several developing countries. Different groups, of course, have different regional and development perspectives.

88. See Gantz, *supra* note 63, at 351 (stating seventy five percent of WTO Members can be considered developing countries while the so called "rich" economies only account for about fifteen WTO Members).

89. See *WTO Members Push for "Development Box,"* AGRA. EUROPE, Feb. 8, 2002, available at 2002 WL 11352599 (listing Cuba, the Dominican Republic, El Salvador, Honduras, Kenya, Nigeria, Pakistan, Sri Lanka and Zimbabwe as nations who would like some additional form of preferential treatment).

A. THE DOHA DECLARATION: "SPECIAL TREATMENT" VS. "EQUAL PARTICIPATION"

The tension between the paradigms of "special treatment" and "equal participation" is evident in the Doha Declaration, and other official documents that provide the framework for the negotiations. What is less clear, however, is whether negotiations will lead to significant market liberalization on products of interest to developing countries. The following discussion reviews the Doha Declaration's development agenda.

1. Doha Decision on "Implementation" Issues

Going into the Doha meetings, developing countries pressed for action to address the problems they saw with implementation of existing provisions of the Uruguay Round WTO Agreements.⁹⁰ As discussed above, developing countries were not satisfied with the implementation of commitments made in the Uruguay Round relating to trade-related technical assistance programs.⁹¹ Such countries also viewed the phase-in provisions in the Agreements as failures. Many developing countries argued that they were unable to comply with their many new obligations. Conversely, the developing countries felt that the developed countries acted too slowly to phase in commitments in key sectors, such as textiles.

Developing countries, particularly the least-developed countries (LDCs), sought renewed commitment at Doha—and in the pre-Doha negotiations—for discussions on implementation issues.⁹² They were successful in getting the issue on the agenda, providing additional evidence that developing countries are now able to participate as influential actors in the WTO.⁹³ "Implementation-related issues and

90. See Pruzin, *supra* note 87, at 1546 (noting that "key developing countries"—Egypt, India, Pakistan—were insisting on implementation commitments as a quid pro quo for negotiating on new issues).

91. See discussion *supra* Part II.C. (commenting on developing countries' complaints about implementation issues).

92. See Harrison, *supra* note 43, at 19 (detailing the developing countries' expectation that specific promises made at Brussels regarding development assistance would be integrated into the WTO Work Program).

93. See Daniel Pruzin, *UNCTAD Chief Predicts Progress in Implementing Existing WTO Pacts*, 19 Int. Trade Rep. (BNA) 267 (Feb. 14, 2002) (forecasting

concerns” are the first topics addressed on the work program of the Doha Ministerial Declaration.⁹⁴ Participants agreed in the program that they “attach the utmost importance”⁹⁵ to these concerns. The work program envisions a two-pronged procedure to implementation: (1) “Where . . . specific negotiating mandate [is provided] in this Declaration, the relevant implementation issues shall be addressed under that mandate; (2) . . . other implementation issues shall be addressed as a matter of priority by the relevant WTO bodies.”⁹⁶

For the latter, the relevant WTO bodies are asked to report to the TNC for “appropriate action” by the end of this year. Moreover, the Decision on Implementation Issues lists more than fifty immediate priorities related to implementation of the Uruguay Round Agreements.⁹⁷

It is too early to tell what the impact of the continued focus on implementation will have on the question of special and differential treatment. On one hand, if the implementation focus results in greater technical assistance for developing countries, this may mean there is greater willingness to take on new commitments. On the other hand, if developing countries use these implementation negotiations to seek the “roll-back” of existing WTO commitments, or to lengthen extensions of the Uruguay Round phase-in periods, this would likely reduce their ability to bargain for increased market access in the developed countries.

that developing countries could reasonably anticipate significant gains during 2002).

94. See Doha Declaration, *supra* note 74, para. 12 (stating negotiations on implementation issues will be an “integral” part of the work program).

95. See *id.*

96. *Id.*

97. See Doha Ministerial Conference – Decision on Implementation-Related Issues and Concerns, (Nov. 20, 2001), WT/MIN(01)/17 [hereinafter Implementation Decision] (responding to developing countries’ concerns regarding problems with implementing Uruguay Round commitments), *available at* http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_implementation_e.htm; see also Pruzin, *supra* note 93, at 267 (noting that the Decision of Implementation of the Uruguay Round agreements includes more than fifty priorities related to that goal).

WTO Members have already disagreed on how the implementation discussions will take place. Early in 2002, China, India, and Pakistan pressed for the creation of dedicated negotiating groups for implementation issues and for special and differential treatment issues.⁹⁸ Developed countries initially resisted this pressure, but eventually reached a compromise, reaffirming that implementation issues would be dealt with in the “relevant bodies,” and that the Committee on Trade and Development would review special and differential treatment in special sessions.⁹⁹

2. Commitment to Strengthen “All Special and Differential Treatment Provisions”

A closing paragraph of the Doha Ministerial Declaration directly addresses special and differential treatment. Paragraph forty-four reaffirms that special and differential provisions are an “integral part of the WTO Agreements” and “agree[s] that all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective, and operational.”¹⁰⁰

This language certainly signals a strong political commitment to the rhetoric of special and differential treatment. The interpretation

98. See *WTO Agreement Near on TNC*, 11 WASH. TRADE DAILY, Jan. 31, 2002, at 1 (reporting on negotiations on ground rules for Trade Negotiations Committee (“TNC”), which was established to oversee Doha Development Agenda talks); *id.* (noting Pakistani Amb. comment that China, India, and Pakistan were pressing for separate negotiating groups for Implementation issues and special and differential treatment issues).

99. See *Trade Negotiations Committee – Statement by the Chairman of the General Council*, TN/C/1 (Feb. 4, 2002) (maintaining that the “relevant bodies” would address outstanding negotiations in accordance with the provisions adopted in the Doha Ministerial Declaration Decision on Implementation-Related Issues and Concerns), available at http://www.wto.org/english/tratop_e/dda_e/tnc_e.htm; see also *Almost There on TNC*, 11 WASH. TRADE DAILY, Feb. 1, 2002, at 3 (chronicling various states’ opposition to or support of the Harbison compromise language); *Compromise Reached on WTO TNC*, 11 WASH. TRADE DAILY, Feb. 4, 2002, at 1 (suggesting that the Quad Member countries—the United States, the European Union, Japan, and Canada—were outwardly supportive of the compromise, but were privately irritated at the “activist role” China, India, and Pakistan chose to take).

100. See Doha Declaration, *supra* note 74, at para. 44.

of this language, however, will be critical. Conceptually, the language appears to seek to increase the binding of the “soft law” obligations that have traditionally existed in the GATT/WTO system. This could promote market liberalization. Special and differential treatment provisions include, for instance, the GATT obligation to reduce trade barriers on products of particular export interest to developing countries.¹⁰¹ On the other hand, if this “strengthening” leads to expanded authority for developing countries to protect domestic industries and agriculture, it risks undermining the WTO goal of market liberalization, as well as the developing countries’ ability to participate in the negotiations on an equal footing.

3. *Commitment to Special Treatment in Agriculture Negotiations*

The Doha Declaration explicitly recognizes a commitment to special and differential treatment for developing countries in the agricultural negotiations.¹⁰² The Declaration states that WTO Members:

[A]gree that special and differential treatment for developing countries shall be an integral part of all elements of the negotiations and shall be embodied in the Schedules of concessions and commitments and as appropriate in the rules and disciplines to be negotiated, so as to be operationally effective and to enable developing countries to effectively take account of their development needs, including food security and rural development.¹⁰³

This is echoed in the Implementation Decision, which asks Members to “exercise restraint” with regard to acting against developing country measures taken for rural development and food security.¹⁰⁴

101. See discussion *supra* Part I.B. (describing special and differential treatment provisions under the GATT).

102. See Doha Declaration, *supra* note 74, para. 13 (noting that negotiations on agriculture were already on-going as part of the built-in agenda).

103. *Id.*

104. See Implementation Decision, *supra* note 97; see also Renate Harrison, *WTO’s “Development Round” and the Least Developed Countries*, 31(1) INT’L LAW NEWS 18, 19 (Winter 2002) (reporting that despite significant opposition from some WTO Members developing countries received a commitment to discuss agriculture export subsidies and an acknowledgement of the need for special and differential treatment to address food security and rural development concerns).

To the extent that the Ministerial Declaration and Implementation Decision were intended to result in greater tolerance for developing countries' assistance to their agricultural sectors, this may be a mixed blessing. It is true that developed countries have provided – and continue to provide – vast assistance to their agricultural sectors, under rules that are often written to permit specific assistance programs that do not exist in developing countries. As a result, it is entirely understandable that developing countries should seek to “match” this assistance, given the enormous importance of the rural sector in their economies.

Developing countries, however, also export significant amounts of agricultural products to other developing countries. It is estimated that “potential gains from agricultural trade liberalization between developing countries is three times greater than the gains developing countries can expect from liberalization in industrialized countries.”¹⁰⁵ Increased developing country government assistance to their agricultural sectors, therefore, could undermine the potential for increased South-South trade by distorting resource allocation.

Moreover, developing countries may, in fact, gain much more from the willingness of developed countries to make significant agricultural policy reforms than they would otherwise gain from the right to provide greater assistance to their domestic agricultural sectors. WTO Members have agreed to enter into negotiations on agriculture with the aim of improving market access and reducing, “with a view to phasing out, all forms of export subsidies and trade-distorting domestic farm support.”¹⁰⁶ Such reductions would directly affect agricultural supports in developed nations, particularly EC Members, with their ingrained supports for domestic agriculture. Agricultural reform in the EC could have a very substantial impact on developing countries' abilities to sustain rural development and achieve food security.¹⁰⁷ To the extent that developing countries

105. Speech of Michael Moore, The Challenges of the Doha Development Agenda for Latin American and Caribbean Countries, Feb. 27, 2002, The Inter-American Development Bank, available at http://www.wto.org/english/news_c/spmm_e/spmm78_e.htm (last visited Mar. 23, 2002).

106. Doha Declaration, *supra* note 74, para. 13.

107. See *Seeds Sown for Future Growth*, ECONOMIST, Nov. 17, 2001, at 65 [hereinafter *Seeds Sown*] (“The habit of subsidising the export of surplus food, a

emphasize their own right to provide assistance, rather than pressing to discipline developed country support programs, they may not achieve the same degree of market liberalization.¹⁰⁸

4. Tariff Negotiations

Improving access for their non-agricultural products to developed world markets was a chief goal of many developing countries.¹⁰⁹ The decision on market access in the Doha Declaration takes an approach that addresses developing country concerns as matters of priority for negotiation. The parties agree to negotiations to reduce or eliminate tariffs and non-tariff barriers “in particular on products of export interest to developing countries.”¹¹⁰ This commitment, if implemented, would go beyond the traditional GATT hortatory commitment to “accord high priority” to reducing trade barriers on such products, to achieve concrete results.¹¹¹ Rather than leaving it up to after-the-fact concessions, “upgrading ‘loose commitments’ into fully ‘binding’ and ‘enforceable’ ones”¹¹² would build the possibility of differential treatment into the main structure of

favourite of the French, is pernicious for poor countries, since it undercuts local markets. As one African said at Doha, issues that ‘may lose elections in France are life and death in Tanzania.’”).

108. See *Around the Globe*, 11 WASH. TRADE DAILY, Feb. 26-27 2002, at 5 (stating that certain developing countries are likely to press hard for agricultural policy reforms during negotiations). Brazil, for example, has recently indicated that it is willing to take on U.S. and EU agricultural export and other subsidies in WTO dispute resolution under the existing rules. *Id.*; see also Daniel Pruzin, *Trade Officials Assess Winners, Losers in Aftermath of Doha Ministerial Meeting*, 18 Int’l Trade Rep. (BNA) 1857 (Nov. 22, 2001) (remarking that Brazil, a major agricultural reporter, is likely to remain engaged in the agricultural negotiations). Brazil was an active participant in shaping the language on agriculture in the Doha Declaration. *Id.*

109. See Harrison, *supra* note 43, at 19 (stating a priority for developing countries was to receive duty free and quota free access to developed country markets for their goods).

110. Doha Declaration, *supra* note 74, para. 16.

111. See discussion *supra* Part I.B. (discussing GATT/WTO provisions that provide for special and differential treatment).

112. See Olivares, *supra* note 44, at 549 (arguing that the WTO trading system needs binding commitments to serve as a mechanism for bridging the gap between poor and rich Members).

negotiations, giving developing countries more incentive to participate in negotiations on tariff reductions.

Any tariff reduction would affect all Members, but would presumably help developing countries more, as the commitment to negotiate is structured to concentrate on exports that they produce and trade. For example, in the long run “[t]he commitment to reduce barriers on industrial goods, particularly ‘peak tariffs’—the top rates that countries use to protect their most sensitive industries—should imply more access for poor countries’ textiles”¹¹³

However, the commitment to negotiate on tariffs continues to recognize the principle of “special and differential treatment.” The Doha Declaration states that there may be “less than full reciprocity in reduction commitments” for developing countries.¹¹⁴ This opens the door to the possibility of developing countries seeking market access from developed countries even though they remain unwilling to liberalize their own markets in a meaningful way.

5. “Singapore Issues:” Investment, Competition Policy, Government Procurement, and Trade Facilitation

In pre-Doha meeting negotiations, many developing countries resisted developed country proposals to undertake negotiations on investment, competition policy, government procurement, and trade facilitation—the so-called “Singapore issues.”¹¹⁵ Their concerns related to a belief that they did not have enough capacity to address existing topics, let alone add new topics for negotiations. At Doha, developing countries negotiated a delay in negotiations on these topics until the 5th Ministerial, which will be held in two years.¹¹⁶ They also gained a commitment for technical assistance to build negotiating capacity.¹¹⁷ The text of the Doha Declaration accounts for

113. *Seeds Sown*, *supra* note 107, at 65.

114. Doha Declaration, *supra* note 74, para. 16.

115. See Harrison, *supra* note 104, at 20 (noting that developing countries resisted expanding WTO negotiating agenda to include Singapore issues).

116. See *id.* (explaining that the Declaration language requires “explicit consensus” before negotiations on these matters may move begin).

117. See *id.* (explaining that the Declaration calls for beginning work on a plan to ensure long-term funding for WTO-related technical assistance in December

developing country interests, as it stresses the “need to address the technical assistance and capacity-building needs of developing countries on the Singapore issues so that they are able to evaluate the impact of multilateral arrangements in these areas on their development objectives.”¹¹⁸

To be successful, the discussions will have to be structured to take into account developing country interests. Developing countries appear unwilling to allow negotiations on these issues to proceed with an “opt-out” for developing countries. For instance, developing countries reportedly rejected a proposal under which investment negotiations would begin, but they could later opt out.¹¹⁹ This might be positive if it meant that at least some developing countries seek to be fully integrated into the WTO system (and to ensure that it reflects their interests), rather than to seek exemptions from commitments to which the rest of the WTO membership agreed.

However, a more likely interpretation is that these countries were simply opposed to any and all talks on the Singapore issues. Indeed, as negotiations begin, some developing countries—in particular Brazil, Pakistan, Paraguay, and some of the African countries—have continued to express reluctance to move these topics to the forefront of negotiations. Developed countries have pressed for special negotiating sessions on the issues, but these countries have resisted, arguing that the Doha agenda does not provide for special sessions.¹²⁰

On the other hand, there are indications that at least some developing countries may have the capacity and interest to participate in serious negotiations to add at least some of these issues to the WTO’s mandate. Eighteen Latin American nations are already

2002).

118. Daniel Pruzin, *Moore Warns of ‘Difficult’ Fifth Meeting of WTO in 2003 to Resolve Singapore Issues*, 47 Int’l Trade Rep. (BNA) 1895 (Nov. 29, 2001).

119. See *How to Approach ‘Singapore’ Issues*, 11 WASH. TRADE DAILY, Feb. 26-27, 2002, at 1 (reporting developing countries have pointed out that Doha’s Development Agenda contains “no mandate for either special or dedicated sessions”).

120. See *id.* (noting that developed countries have pressed for special negotiating sessions on “Singapore” issues like Trade and Investment, Competition Policy, Trade Facilitation and Transparency in Government Procurement, but developing countries have insisted that there was no mandate in Doha for such sessions).

participating in negotiations under the Free Trade Agreement of the Americas, which touch on obligations of transparency in government procurement.¹²¹ Developing countries also have interests and needs related to the other Singapore issues, which could usefully be addressed:

It should be borne in mind that the need for multilateral rules on competition and investment were originally raised by developing countries themselves, at the end of the 1970s, within the UNCTAD framework and maintained until today in our mandate. Work in these areas . . . could concentrate on identifying the elements of viable solutions, which would be most compatible with the interests of developing countries.

[T]here is an urgent need to identify the anti-competitive practices that inhibit the export of goods and services of the developing countries, particularly, the LDCs, and impair the productive capacity of their own firms in their own markets. It is clear that in countries that have adopted or are in the process of adopting market-oriented reforms, competition policy plays an essential role.¹²²

Participation in serious negotiations on these issues may also allow developing countries to link progress with progress on their priorities concerning reform of existing WTO rules.¹²³ However, the

121. See Mike Moore, *The Challenges of the Doha Development Agenda for Latin American and Caribbean Countries*, Address Before the Inter-American Development Bank (Feb. 27, 2002) (noting that Singapore issues are already being addressed in regional and bilateral negotiations outside the multilateral WTO forum), available at http://www.wto.org/english/news_e/spmm_e/spmm78_e.htm (last visited Mar. 22, 2002).

122. Ricupero, *Development Implications of Doha*, 29 SOUTH BULLETIN, at 18-19, available at http://www.southcentre.org/info/southbulletin/bulletin29/bulletin29-09.htm#P455_77051 (last visited Mar. 19, 2002); see also Someshwar Singh, *Doha Set The Stage For Future Negotiations – Ricupero*, 24-25 SOUTH BULLETIN at 2, 4 (Nov. 30, 2001) (“[I]f countries fear something in investment or competition, they should formulate proposals to address those fears—good legal rules that would prevent those fears from materializing.”), available at http://www.southcentre.org/info/southbulletin/bulletin24-25/bulletin24-25-01.htm#P35_5875.

123. See Rafael D. Frankel, *Momentum Toward New WTO Round Emerges from EU and ASEAN Meetings*, 18 Int. Trade Rep. (BNA) 1477 (Sep. 20, 2001) (reporting that the EU was willing to compromise on its Antidumping position if developing countries were equally prepared to compromise on issues like environment and minimum investment and competition standards).

definitive position of developing countries on the Singapore issues remains to be seen.

6. AD/SCM Agreements

Members agreed to negotiations on WTO rules on dumping and subsidies—a priority for developing countries that believe that developed economies such as the United States have used the Uruguay Round Agreements on dumping and subsidies as a means of protectionism.¹²⁴ This was an agreement that the United States had resisted.¹²⁵ There is a commitment in these negotiations to take the needs of developing country and LDC participants into account, particularly with regard to fisheries subsidies.¹²⁶

Including the dumping and subsidy rules in the negotiations may be a positive development from the standpoint of encouraging developing countries' equal participation in the WTO. If stronger multilateral disciplines on anti-dumping and countervailing duty proceedings can be developed, this would show that developing countries are able to work through the WTO process to achieve important market access goals.¹²⁷ An important question, of course,

124. See Pruzin, *supra* note 108, at 1857 (noting some Members sought negotiations on the Antidumping and Subsidies Agreements to address perception that the United States was using these instruments for protectionism); *see also id.* at 1856 (explaining that Doha mandate was to clarify and improve the Antidumping and Subsidies Agreements).

125. See Gary G. Yerkey, *U.S. Welcomes WTO Plan for Launching New Trade Talks but Sees Problems Ahead*, 18 Int. Trade Rep. (BNA) 1548 (Oct. 4, 2001) (acknowledging Congressional opposition to reopening negotiations on the Antidumping and Subsidies Agreements).

126. See Doha Declaration, *supra* note 74, paras. 28-29 (emphasizing fisheries subsidies particularly, due to their importance in developing countries' economies).

127. It should be noted that developing countries increasingly have a more nuanced attitude toward these measures, as they become users, not merely targets, of such actions. See WTO Annual Report, *supra* note 71, at 31 (noting India has initiated 27 AD investigations tying the United States as second highest user of AD measures). For example, India has used antidumping measures against Chinese imports, as trade between the two grew even prior to China's WTO accession. See Pruzin, *supra* note 108, at 1857. India, and other developing countries, may find that they are better served by negotiating to refine rules that they themselves plan to use, rather than by negotiating special and differential treatment separating themselves from the rules, or pressing for further phase-in delays.

will be how the needs of developing countries are taken into account. Will this mandate mean that the talks address substantive antidumping/countervailing duty reforms of interest to developing countries? Or, will it mean that developing countries maintain and expand the existing "special treatment" for their subsidies in Article 27 of the SCM Agreement?¹²⁸

Developing countries have important market-liberalizing interests in the anti-dumping and countervailing duty area, such as preserving their hard-won market access on products such as textiles and avoiding an impossible competition with the subsidies provided by richer countries.¹²⁹ The Doha negotiations will reveal whether countries see their interests more as liberalizing other markets or as protecting their own.

7. Technical Cooperation and Capacity Building

Underlying the work program laid out in the Doha Declaration is a series of commitments to technical cooperation and capacity for developing and less-developed countries.¹³⁰ If such commitments are fulfilled, developing countries and LDCs will have a greater ability to participate equally in structuring the new round to respond to their needs and interests. On the other hand, there is potential for backlash from the developing countries if the agreed commitments are not met.¹³¹ There is a possibility the developing countries could refuse to negotiate or agree on disciplines in certain areas, or on any integrated agreement, if the commitments are not fulfilled. This problem may be especially acute with respect to the "Singapore issues" to be added after the Fifth Ministerial.

128. See Agreement on Subsidies and Countervailing Measures, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A (Apr. 15, 1994), available at http://www.wto.org/english/docs_e/legal_e/final_e.htm.

129. See *supra* notes 70-73 and accompanying text (referring to the Agreement on Textiles and Clothing that developing countries have heralded as entitling them to market access into developed countries' markets).

130. See, e.g., *supra* notes 116-23 and accompanying text (analyzing the commitment to address technical assistance and capacity building related to the Singapore issues).

131. See Moore, *supra* note 121 (noting the importance of providing technical assistance and capacity building to developing countries, because of the trust they displayed in joining the consensus at Doha).

The WTO as an organization does appear to be rapidly taking steps to address developing countries' concerns that commitments to capacity building and technical assistance for developing and LDC countries may not be met. Based on the Doha Ministerial Declaration, the sub-committee on Least-Developed Countries has already agreed on a work program.¹³² Technical assistance and capacity building are addressed in several elements of the program. There is an expressed commitment to work with other international agencies to achieve these goals, and an expressed commitment to enable more LDCs to join the WTO. The WTO's budget for 2002 will also include spending on technical capacity and training assistance for Members that is eighty percent higher than previous budgets.¹³³ Such significant efforts should make it easier for developing countries to accept new obligations, and thereby achieve greater market access and avert measures that threaten to restrict their access.¹³⁴

B. THE NEW ROUND

As discussed above, the tension between the "special treatment" and "equal participation" paradigms is inherent in all aspects of the Doha negotiations. This section seeks to set forth a few basic principles that seem necessary in order for developing countries' participation to occur in a way that liberalizes rather than restricts market access.

132. See WTO Work Programme for LDCs Adopted by Subcommittee on LDCs, (Feb. 13, 2002), WT/COMTD/LDC/11 [hereinafter Work Programme for LDCs] (stating work programme for LDCs will focus on systemic issues such as market access, trade related technical assistance and capacity building initiatives, etc.), available at http://www.wto.org/english/news_e/pres02_e/pr272_e.htm.

133. See *Moore Meets Ministers, Senior Officials in Doha Follow-up*, Press/269, Jan. 22, 2002 (reporting that the WTO budget will include an eighty percent increase in technical capacity and training assistance from earlier budgets), available at http://www.wto.org/english/news_e/pres02_e/pr269_e.htm.

134. For instance, a greater degree of participation in the new obligations might help developing countries to stave off the use of labor and environmental standards to hinder their access to European and North American markets.

1. Enhanced Participation by Developing Countries Is Fundamental

For developing countries to take on new obligations in the Doha talks, and thereby obtain greater market access themselves, they will properly insist upon equal participation in making the rules. Developing countries are already taking an active role in structuring this round of trade negotiations. Their meaningful participation in the round is recognized as crucial to the success of future negotiations. WTO Director General Mike Moore has said:

The Doha Development Agenda agreed last year will fail without dramatic progress in market access. It will fail if we do not build capacity so that marginalized and capacity-constrained nations can meaningfully participate in complex new development negotiations and develop good governance in such areas as investment, government procurement, trade facilitation, competition and the environment.¹³⁵

Besides the necessary building of developing countries' ability to negotiate, China's accession to the WTO may also help developing countries participate meaningfully in the Doha Agenda. China has allied itself with developing countries in the trade talks.¹³⁶ Others have already recognized that "with China, India and Pakistan expected to remain firm on new ground rules for the negotiating committees, many least-developed and developing countries were emboldened similarly to oppose whatever Quad Members say—a significant post-Doha development that emerged because of China's new-found presence."¹³⁷ Of course, the results of these ties with China will depend on how China chooses to act within the WTO.

135. Michael Moore, Making Globalization Work, Address Before the International Confederation of Free Trade Unions, Feb. 20, 2002, available at http://www.wto.org/english/news_e/spmm_e/spmm76_e.htm (last visited Mar. 22, 2002).

136. See *China to Play 'Constructive' Role at WTO*, 11 WASH. TRADE DAILY, Jan. 28, 2002, at 2 (noting China's allegiance to developing countries in the WTO).

137. *WTO Agreement Near on TNC*, 11 WASH. TRADE DAILY, Jan. 31, 2002, at 2.

2. The Negotiations Should Give Priority to Developing Country Interests, but Emphasize Market Liberalization Rather Than Market Restriction

Regardless of whether developing countries are able to participate equally in negotiations, the emphasis on special and differential treatment in the Work Program ensures that the need for “special treatment” will be an on-going topic throughout the different areas of negotiation.

The challenge will be to implement “special treatment,” in light of the commitment to strengthen such provisions, in such a way that markets are liberalized and not closed. For example, Pakistan (supported by seven other developing countries) has already proposed that a “development box” be added to the Agreement on Agriculture to allow LDCs to “depart from normal rules” so that they may offer domestic support and export subsidies to their agricultural sector.¹³⁸ Pakistan argues such an exemption to the rules would allow LDCs to “catch up” with more developed countries that offered such programs in the past. India has proposed a new set of special and differential rules to protect poor farmers and support rural development.¹³⁹ India has argued in the same negotiations that developing countries should be allowed to “hike tariffs, [to] have the ability to impose special safeguard measures and [to] amend current rules for tariff-rate quota administration so that ‘developing countries’ exports can have improved access opportunities in the markets of WTO Members using TRQs.”¹⁴⁰

It would be preferable to provide “special treatment” by taking up the aspects of these proposals that liberalize trade, rather than the elements that would increase tariffs and restrict markets. In the long run, special treatment via high tariffs seems less likely to allow for the development of sustainable rural development and food security

138. *See Another Ag ‘Box’ in WTO for LDCs?*, 11 WASH. TRADE DAILY, Feb. 5, 2002, at 3-4 (noting United States opposition to development box concept because the United States argued that Doha called for phasing out and reducing export subsidies).

139. *See Splitting Over Ag S&DT for LDCs*, 11 WASH. TRADE DAILY, Feb. 6, 2002, at 1 (reporting that India submitted a paper during WTO agriculture negotiations, which proposed new special and differential treatment for LDCs).

140. *Id.*

than improving access to developed country markets (and markets of other developing countries) for LDCs and developing countries.¹⁴¹ As one author writes:

[T]rade liberalization must be balanced, and it must reflect the concerns of the developing world. It must be balanced in agenda, process, and outcomes. It must take in not only those sectors in which developed countries have a comparative advantage, like financial services, but also those in which developing countries have a special interest, like agriculture and construction services. It must not only include intellectual property protections of interest to the developed countries, but also address issues of current or potential concern for developing countries, such as property rights for knowledge embedded in traditional medicines, or the pricing of pharmaceuticals in developing-country markets.¹⁴²

Developed-country offers to improve market access on products of particular interest to developing countries would be a preferable form of special and differential treatment. The Doha negotiations will need to take account of the need to identify and respond to market access barriers, which affect goods and services in which developing countries may have competitive opportunities to export to developed country markets. This will mean some soul searching for developed country leaders who must face down the interests of domestic textiles and agricultural producers as well as some industrial product producers who would prefer not to have competition from low-wage economies.¹⁴³

Finally, it is worth emphasizing that there are ways in which the WTO could take into account developing country interests without providing "special treatment." A commitment to reflect the special needs of developing countries need not be equated with special

141. *See id.* (stating that the "European Union asked – 'if the Like-Minded-Group of countries need their existing or even higher level of protection in their domestic markets, how will they succeed in competing with the Cairns group for a share of lower priced markets in the developed countries?'").

142. JOSEPH E. STIGLITZ, *TWO PRINCIPLES FOR THE NEXT ROUND: OR, HOW TO BRING DEVELOPING COUNTRIES IN FROM THE COLD 3* (Geneva, 1999).

143. *See Tangled Up in Textiles*, *THE ECONOMIST*, Mar. 30, 2002, 25 (discussing significant political pressure by textile interests in the United States); *id.* (questioning the United States' commitment to free trade when the United States refused to increase quotas or cut tariffs for Pakistani textiles in response to strong domestic lobbying against such action).

treatment. For example, many developing countries, particularly the LDCs, would be interested in quicker and simpler dispute settlement. This would require less commitment of resources and require less technical capability. Faster resolution of certain disputes might also make them more willing to use the Dispute Settlement Understanding.

3. The Way Forward Is Not by Going Backward

Greater market access for developing country interests, which facilitates development through trade, is preferable to re-balancing by weakening the existing liberalisation commitments of WTO Members. Using the famous “bicycle” model of trade liberalization, if it is hard to stay upright without pedalling forward, it is even harder when pedalling backward. Aside from the restrictive impact of such measures themselves, they would set an ominous precedent for the WTO and would undermine the credibility of developing countries as negotiating partners.

This does not rule out reconsideration of the Uruguay Round obligations in light of the reality of implementation since 1995. Where it will help implementation, further flexibility should be made available, but only where absolutely necessary in light of analysis of the implementation problems and other possible solutions such as technical assistance. Simplifying Uruguay Round commitments and providing technical assistance should help ease the pressure for roll-back of Uruguay Round commitments. However, it is important that developed countries be responsive in negotiations.

Will developing countries conclude that their interests are better served by a round that achieves meaningful market opening reforms in sectors of interest to them, than by “rolling back” under the banner of “implementation” substantive commitments made in the Uruguay Round? Here, there is a relationship to the implementation issue discussed earlier. Simplifying the original commitments, where possible, and providing technical assistance would promote a positive, market-liberalizing outcome to this critical question.

CONCLUSION

There are serious questions as to whether the agenda laid out at Doha is an agenda that can succeed in reaching a single integrated agreement. Notably, not until 2003, and the Fifth Ministerial, will there be resolution of the question of negotiations on the Singapore issues. At the same time a decision will have to be made as to whether there has been sufficient capacity building such that the WTO's less developed Members can effectively take part in negotiations.

The challenge for developing (and developed) countries as negotiations begin is not to focus solely on the apparent benefits that may be gained from the rollback or further delay of Uruguay Round commitments or new concessions of special and differential treatment. A negotiation that achieves meaningful market opening reforms in sectors of interest to developing countries—such as agriculture or textiles—is a negotiation that would better serve the long-term goal of development.¹⁴⁴ The “Development Box” proposal by developing countries in the ongoing agricultural negotiations has already brought charges that developing countries seek to “pick and choose.”¹⁴⁵

144. *But see* DANI RODRIK, THE GLOBAL GOVERNANCE OF TRADE AS IF DEVELOPMENT REALLY MATTERED 11 (UNDP Oct. 2001), available at http://www.undp.org/mainundp/propoor/docs/pov_globalgovernancetrade_pub.pdf (last visited Mar. 23, 2002). Rodrik states:

One of the key propositions is that developing countries are short-changing themselves when they focus their complaints on specific asymmetries in market access (tariff peaks against developing country exports, industrial country protection in agriculture and textiles, etc.) . . . [t]hey would be far better served by pressing for changes that enshrine development at the top of the WTO agenda, and correspondingly provide them with a better mix of enhanced market access and maneuvering room to pursue appropriate development strategies.

This perspective appears to overlook the inherent linkage between “enhanced market access” and “maneuvering room”—it is unlikely that developing countries will be able to obtain significant market access while avoiding commitments regarding their own domestic policies.

145. *See* Daniel Pruzin, *Major Traders Throw Cold Water on Calls for 'Development Box' in Agriculture Talks*, 19 Int'l Trade Rep. (BNA) 262 (Feb. 14, 2002) (noting that United States officials contend that the “Development Box” proposal is inconsistent with the Doha mandate which requires all WTO Members

Developing countries will not be successful in obtaining significant market access if they seek solely to gain preferential treatment.¹⁴⁶ Rather, developing and developed countries must work together to assemble a workable and attractive package on improved market access for sectors of particular interest to developing countries. While the concept of “special treatment” will always be a component of WTO negotiations, its use to avoid market liberalization is problematic and should be reserved for cases where it is truly essential.

to make commitments on all agricultural products).

146. *See id.* (remarking that many developing countries, such as Cairns Group Members, Argentina, Chile, and Thailand contend that allowing developing countries greater flexibility to use farm subsidies would not be in their interest and that the WTO should instead encourage more trade amongst developing nations).

* * *