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Proposed Changes to WTO Special and Differential Treatment Provisions: An Analysis from the Perspective of Asian LDCs

Mustafizur Rahman*
Kazi Mahmudur Rahman*

*Mustafizur Rahman is the Research Director of Centre for Policy Dialogue(CPD), Bangladesh and
*Kazi Mahmudur Rahman is Senior Research Associate of CPD. The views presented in this paper are those of the authors and do not necessarily reflect the views of ARTNeT members, partners and the United Nations. This study was conducted as part of the Asia-Pacific Research and Training Network on Trade (ARTNeT) initiative, aimed at building regional trade policy and facilitation research capacity in developing countries. The technical support of the United Nations Economic and Social Commission for Asia and the Pacific is gratefully acknowledged. This work was carried out with the aid of a grant from the World Trade Organization (WTO). The authors are very grateful to Yann Duval and Patrick Low for their valuable comments on an earlier draft, as well as for the valuable guidance provided by Debapriya Bhattacharya, Executive Director, CPD in the course of their work on this paper. Any remaining errors are the responsibility of the author. The author may be contacted at mustafiz@cpd-bangladesh.org.

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ACRONYMS

AB	-	Appellate Body
AFTA	-	ASEAN Free Trade Area
AGOA	-	African Growth and Opportunity Act
AMS	-	Aggregate Measure of Support
AoA	-	Agreement on Agriculture
ADD	-	Anti-Dumping Duty
BIMST-EC	-	Bay of Bengal Initiative for Multisectoral Technical and Economic Cooperation
BFTAs	-	Bilateral Free Trade Agreements
BoP	-	Balance of Payment
CB	-	Capacity Building
CBI	-	Caribbean Basin Initiative
CTD	-	Committee on Trade and Development
CTD-SS	-	Committee on Trade and Development – Special Session
DDR	-	Doha Development Round
DF-QF	-	Duty Free-Quota Free
DMEs	-	Developed Market Economies
D-8	-	Developing 8 Countries
DG	-	Director General
DSB	-	Dispute Settlement Body
DSM	-	Dispute Settlement Mechanism
DSU	-	Dispute Settlement Understanding
DTIS	-	Diagnostic Trade Integration Studies
EU-EBA	-	European Union – Everything But Arms
FA	-	Financial Assistance
FDI	-	Foreign Direct Investment
GATS	-	General Agreement on Trade in Services
GATT	-	General Agreement on Tariffs and Trade
GC	-	General Council
GSP	-	Generalized System of Preferences
GSTP	-	Global System of Trade Preferences
IF	-	Integrated Framework
IMF	-	International Monetary Fund
IOR	-	Indian Ocean Rim Initiative
IPRs	-	Intellectual Property Rights
JITAP	-	Joint Integrated Trade Assistance Programme
LDCs	-	Least Developed Countries
MFN	-	Most Favoured Nation
NAMA	-	Non-Agricultural Market Access
NTBs	-	Non-Trade Barriers
PSI	-	Pre-Shipment Inspection
PTN	-	Protocol Relating to Trade Negotiations among Developing Countries
RoO	-	Rules of Origin
RTAs	-	Regional Trade Agreements
S&D	-	Special and Differential Treatment
SAFTA	-	South Asian Free Trade Area
SAGQ	-	South Asian Growth Quadrangle
SAPTA	-	SAARC Preferential Trading Arrangement
TA	-	Technical Assistance

TCB	-	Trade Capacity Building
TRCB	-	Trade Related Capacity Building
TRIMs	-	Trade Related Investment Measures
TRIPS	-	Trade Related Aspects of Intellectual Property Rights
TRTA	-	Trade Related Technical Assistance
UNCTAD	-	United Nations Conference on Trade and Development
WB	-	World Bank
WIPO	-	World Intellectual Property Organisation
WTO	-	World Trade Organisation

EXECUTIVE SUMMARY

Special and differential treatment (S&D) provisions introduced in the GATT and the WTO in support of strengthened global integration of the developing country (DC) and least developed country (LDC) members have come under increasing scrutiny and criticism in recent years. One criticism has been that most of the S&D provisions are weak in their formulations, i.e., are expressed in the form of best endeavour clauses and hence are non-enforceable. The other strand of argument is that in order for the S&D provisions to be effective and enforceable they ought to be targeted to countries that are in need of them most and be applied not in general, but with discretion, by identifying and targeting select group of developing countries that require a particular type of support most. The Ministers in Doha, at the 4th WTO Ministerial Conference, therefore agreed that all S&D provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational. A number of proposals have since been put forward and discussed by WTO members.

Following a comprehensive review of the relevant S&D literature, an assessment of a select set of proposals to improve S&D WTO provisions is undertaken from the particular perspective of Asian LDCs. The analysis focuses on 12 Agreement Specific proposals which have been identified as having a high likelihood of reaching a decision (belonging to the so-called *Category I Proposals*). In addition, the paper takes a critical look at the five LDC specific proposals on which specific decisions were reached during the WTO Hong Kong Ministerial Meeting in December 2005. In undertaking the assessment of the 17 aforementioned proposals the paper compares the original proposals submitted by the various Members with the negotiated compromise and examines and analyses the relevance, priorities, concerns and the interests of the LDCs of the Asian region in the context of these 17 Agreement Specific proposals.

The analysis reveals that a majority of the reviewed proposals has failed to fully satisfy the demands of the Asian LDCs. In most cases, there is a high degree of divergence between what the original demand of the LDCs had been, as was articulated in the original proposals submitted to the WTO, and the wordings of the proposals that were finally negotiated. The paper argues that in most cases there is no benchmark which could serve as a reference point to compare and monitor whether a particular S&D provision is either being faithfully implemented or that it is reaching its objective. There is no concrete mechanism to ensure enforcement of the provisions. The paper further points out that in most cases a true and faithful implementation of the agreed proposals would hinge critically on a substantive inflow of technical and financial support from the developed countries and this is hardly forthcoming. The paper stresses the need for ensuring *coherence* and points out further that the need for coherence was indeed recognised in the Doha Ministerial Decision and that it was subsequently reiterated in the Hong Kong Ministerial Decision of the WTO. The paper underscores the need for a meaningful *Development Package* in the WTO that would put faithful implementation of the S&D clauses at the heart of the *Doha Development Round*.

INTRODUCTION

Special and differential treatment (S&D) provisions in the multilateral trading system emerged as a recognition of the specific problems that developing countries (DCs) and least developed countries (LDCs) were facing in their effort to integrate with global markets for goods, services, capital and labour. WTO Member Countries generally tend to agree that most of the LDCs have not been able to benefit fully and equitably from a liberalising global trade environment because of their weak institutions, inadequate infrastructure, weak bargaining capacity, scarce human resources and formidable supply side constraints. On the part of developed countries, the offer of S&D was also informed by the fact that if DCs and LDCs fail to integrate with the global trading system from a position of strength, it will limit the overall benefits in terms of global welfare that could potentially originate from the ongoing process of liberalisation and globalisation. The S&D provisions in the various WTO Agreements were designed to address these concerns.

In identifying theoretical rationale for granting of temporary S&D to DCs and LDCs in terms of both protection of domestic market and also ensuring preferential market access as part of WTO agreements, Conconi and Perroni (2004) have argued that, under the WTO rules, S&D can be interpreted as a *'transitional equilibrium feature of a self-enforcing international agreement between a developed and a developing country, where both transitional and post-transitional policy choices can be sustained by each party because of the policy path followed by the other'*. So, in a way S&D provisions in GATT/WTO reflected a confluence of interests of both DCs and LDCs on the one hand, and the Developed Market Economies (DMEs) on the other.

At the Doha Ministerial Conference of the WTO, member states in their joint declaration on November 14, 2001 (WT/MIN/(01)DEC/1), reaffirmed that S&D provisions are an integral part of the WTO agreement. The Ministerial declaration stressed that integration of LDCs into the multilateral trading system will require meaningful market access, support for diversification of their production and export base, and trade-related technical assistance and capacity building. S&D provisions were to play a critically important role in achieving these objectives. The Hong Kong Ministerial meeting also reiterated this support and reaffirmed that 'provisions for special and differential (S&D) treatment are an integral part of the WTO Agreements'.

However, S&D provisions in the WTO have come under increasing criticisms in recent years. These criticisms focused on three issues: (a) design and formulation, (b) enforceability, and (c) assistance for implementation of S&D clauses. Many of the S&D provisions were criticized because of their interpretative ambiguities and absence of any binding commitments on the part of the developed countries in implementing these provisions that were often articulated through *best endeavour* clauses. It is these concerns that led to the inclusion of paragraph 44 of the Doha Ministerial Declaration which stipulated that, *'members agreed that all S&D provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational.'*

According to UNCTAD, in 2004, LDCs share in world trade (export plus import) stood at 0.68 per cent (approximately \$13 billion), compared to 3.06 per cent in 1954.¹ It is true that the share of the LDCs in global export has increased marginally from 0.46 per cent to 0.58 per cent between 1998 and 2003 and that share of import has also registered a marginal increase from 0.69 per cent in 1998 to 0.71 per cent in 2003.² In this connection, it is pertinent to remember that the top 5 exporters among the LDCs in 2003 (Angola, Bangladesh, Yemen, Equatorial Guinea and Myanmar) accounted for about 57 per cent of the total exports of the group. This process of concentration within the LDC group has been on the rise in the recent past. This would mean that the overwhelming majority among the LDCs are being marginalised at an accelerated pace. More than half of the LDC population continues to live on less than \$1 a day, while about 81 per cent live on less than \$2 a day. The number of people living in extreme poverty in LDCs is likely to increase from 334 million in 2000 to 471 million in 2015 (UNCTAD 2004). During 1995-2003, LDCs as a group continued to experience high negative trade balance; indeed, average trade deficit increased by more than 30 per cent in the non-oil, primary commodity dependent LDCs. The majority of the LDCs are not able to address the challenges and access the potential opportunities emanating from opening up of trade in goods and services. The picture is no different when global investment and financial flows are considered. It is in the aforesaid context that relevance and role of S&D provisions in the WTO need to be reviewed and examined as tools that aspire to address and correct the existing vulnerabilities of the LDCs in the multilateral trading system.

In view of the perceived weaknesses in the S&D provisions, developing countries and LDCs have been calling for a review of relevant articles with a view to making these '*more precise, effective and operational*' as is mandated by the Doha Declaration. This mandate led to the decision taken by consensus, of a review of the S&D provisions in the WTO. Since the Doha declaration, LDCs and DCs have submitted 88 Agreement specific proposals in the area of S&D accorded under the various WTO Agreements. As WTO member countries failed to reach an agreement on these between March 2002 and February 2003, the Chairman of the General Council, in coordination with the Chairman of the Committee on Trade and Development, explored the possibility (in consultations held between mid-March and the beginning of April, 2003) of a fresh approach to the work on Agreement specific proposals. The approach paper circulated by the Chairman on 8 April 2003 (JOB(03)/68) was based on two fundamental premises: (i) a prior understanding that all the Agreement specific proposals remain on the table and will be addressed; and (ii) a recognition that an informal categorisation of the proposals was required for these to be addressed in an effective manner.

Accordingly, Chairman of the General Council grouped all S&D proposals into three broad categories; *Category 1* comprised of 12 proposals³ as regards which Members have come to an agreement in principle; this category also included 26 other proposals on which there appears to be greater likelihood of making recommendations, or which would have enhanced developmental value of the

¹ It should, however, be kept in mind that LDCs, as a distinct sub-strata among the developing countries was identified by the UN only in 1971.

² Petroleum and petroleum product exports from LDCs estimate 33 per cent of total LDC export to the world (for the US market, the share was as high as 63.3 per cent).

³ These proposals are contained in Annex III of TN/CTD/7.

Agreements. *Category II* comprised of 38 proposals; these included 27 proposals covering areas in which mandated negotiations are continuing and also 11 other proposals the operative part of which are being considered in the respective WTO bodies. *Category III* includes proposals on which there appears to be, as of now, wide divergence of views, and as regards which the Chairman felt that progress might not be possible without a certain degree of redrafting of the original texts that were presented. Following the discussions held prior to the Cancun Ministerial, the Chairman of the General Council proposed specific decisions on 24 proposals out of which 23 were from category I, and 1 from category II. During the Cancun Ministerial Conference 3 more proposals from Category I were added to this list. The LDCs and the African Group refused to accept the decision considering that the proposals put forward by the chairman did not have much economic value; they preferred to have decisions on all S&D proposals placed by them.

The failure of the Cancun Ministerial meant that the progress in terms of improving the effectiveness of the S&D clauses suffered a serious setback. However, the July 2004 General Council Decision (the July Framework) was able to put the discussion back on track. In the Special Session of the GC, Members instructed the Committee on Trade and Development (CTD) to 'expeditiously complete the review of all outstanding Agreement specific proposals and report to the General Council with clear recommendations for a decision, by July 2005'. During the subsequent year, work on S&D continued on the basis of the July Framework Decision and within the parameters of paragraph 44 of the Doha Ministerial Declaration and paragraph 12 of the 'Decision on Implementation-Related Issues and Concerns'. A dedicated special session of the CTD was initiated in July 2005 to carry forward the issue (especially LDC Agreement-specific proposals). Although the expectation was that a consensus could be reached on this, Members were unable to come to an agreement on the relevant issues.

It is of crucial importance that members move forward on S&D issues to translate their commitment towards addressing the problems faced by DCs and LDCs into tangible and meaningful results. There appears to be a consensus among all WTO members on this. However, it has been argued by some that the current proposals have a number of limitations: Firstly, there is a lack of prioritisation of the proposals for the purpose of negotiations; secondly, a number of proposals suffer not only from lack of usefulness in the present context, but also suffer from lack of feasibility; and thirdly, proposals pertaining to similar areas submitted by different developing and least developed countries have varying undertones and suggestions which tend to

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