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Special and Differential Treatment for Developing Countries

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1. Introduction

In the aftermath of the failed World Trade Organization (WTO) Ministerial Conference in Seattle in June 1990 a heated debate about special and differential treatment (SDT) has developed in the trade policy community. According to a widely cited definition this instrument is “the product of the co-ordinated political efforts of developing countries to correct the perceived inequalities of the post-war international trade system by introducing preferential treatment in their favour across the spectrum of international economic relations” (Gibbs 1998). This definition shows that special and differential treatment can be considered as an expression of the long-standing struggle for a more equitable world economic order. It encompasses the entire range of regulations whose integration into the international trade regime has been advocated by Southern governments. The progress in implementing these special provisions has always been proof of the negotiation clout of these governments.

After its final integration into the General Agreement on Tariffs and Trade (GATT) special and differential treatment underwent a radical change which was described by many observers as a transformation from a development to an adjustment instrument. This change occurred during the Uruguay Round of GATT that started in 1986. The end of this eight-year long liberalisation round not only saw the agreement to found the World Trade Organization but also a fundamentally changed concept of special treatment which in the years to come should turn out to significantly weaken development policy concerns. The more conspicuous the difficulties of the developing countries in implementing the WTO agreements became, the louder became the demands to re-strengthen special treatment.

The present study deals with exactly this issue. It describes the history as well as the impact of this trade policy instrument and discusses the different proposals to strengthen it. The practical relevance of these proposals is not to be underestimated. The concrete design of special and differential treatment will depend greatly on the extent to which acknowledged development policy shortcomings of the WTO agreements can be remedied in the future. To conclude this study we will present various issues and intervention possibilities which should be taken into account in the further and more intensive discussion of the special treatment.

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2. History and Overview

The history of special and differential treatment (SDT) of developing countries can be divided in two phases: The time before and after the GATT Uruguay Round which began in 1986. This eight-year negotiation round at whose end in 1994 stood the ratification of the "Marrakesh Agreement Establishing the World Trade Organization" marks a tidal change in the concept of special treatment. The quality and background of this change will be described below.

2.1 The Road to the Enabling Clause

The General Agreement on Tariffs and Trade (GATT) in its original version of October 1947 did not include specific provisions for developing countries. Rights and obligations were the same for all contracting parties. The preamble emphasises that on the basis of mutuality and reciprocity trade barriers in international trade were to be removed and discrimination was to be abolished. GATT was intended as a provisional agreement which was to be substituted by the broader Havana Charter to establish an international trade organization (ITO). The US Congress, however, prevented the ratification of the Charter by the USA and thus the foundation of the ITO. Consequently, since 1 January 1948 all international trade issues had to be dealt with under GATT. Of the originally 23 signatory states of GATT, 11 can be considered as developing countries[1]. It has to be noted that at that time many of these countries were still under colonial rule and won independence only in the subsequent years.

GATT and import substitution

In the ITO negotiations which took place between November 1947 and March 1948 the developing countries managed to introduce an additional clause in the Havana Charter. This clause allowed them to apply national protection measures to support "economic development and reconstruction" of industry and agriculture, although such measures were in general prohibited in the Charter. In 1948, this clause was introduced into GATT as Article XVIII via an amendment. Ever since, developing countries have taken part in GATT as equal parties. Applications for weakening or suspending their obligations were discussed in specific working groups.

In the years following the coming into force of GATT, Southern governments increased their efforts to have their specific needs taken into consideration in the international trade regime. They could draw on a consensus which endured until the mid-70s and which postulated that due to the characteristics of the international division of

[1] Brazil, Burma (Myanmar), Ceylon (Sri Lanka), Chile, Cuba, China, India, Lebanon, Pakistan, Southern Rhodesia und Syria.

labour liberal trade policy could promote neither industrialisation nor development adequately. Above all Prebisch and Singer provided a theoretical framework against development triggered by foreign-trade which, they argued, does not deliver adequate protection for so-called infant industries. Unconditional and premature opening towards the world market, so the then widely accepted argument runs, perpetuates the dependency on the export of primary goods and raw materials since due to cheap imports there is no incentive to invest in domestic production capacities. Another argument that was brought up were the so-called terms of trade which develop to the detriment of primary goods and raw materials. This causes volatile and decreasing export revenues which in turn are responsible for an imbalance of payment.

Politically, these arguments manifested themselves in a strategy of import-substituting industrialisation which to some extent had been pursued since the 1930s. The building blocks of this strategy were the relative devaluation of the domestic currency, tariff increases and non-tariff trade barriers, expansive monetary policy, expansion of the public sectors and the internal market and promotion of diversified processing industries and a broader range of export goods. This policy has to be understood in its historical context, namely as a reaction to the catastrophic effects of the worldwide economic crisis of 1929 which had had immense negative consequences for many countries in the southern hemisphere and which due to the collapsed world trade had made export-oriented development impossible.

Southern governments recorded their first success during the review of GATT in 1954/55. Article XVIII was thoroughly revised in such a way that only developing countries were entitled to make use of the provisions in Sections A, B and C of the revised version[2]. Section A provides for the possibility to modify or withdraw obligations to reduce tariffs "in order to promote the establishment of a particular industry" (Article XVIII, paragraph 7a). The newly introduced Section B acknowledged the developing countries' difficulties concerning the balance of payments "arising mainly from efforts to expand their internal markets as well as from the instability in their terms of trade" (Article XVIII, paragraph 8). Therefore, Section B facilitated the introduction of quantitative and qualitative import restrictions by a country in order to "forestall the threat of, or to stop, a serious decline in its monetary reserves" or, if these are inadequate, "to achieve a reasonable rate of increase in its reserves" (paragraph 9). Section C allows support of infant industries – a provision which deviated from the other provisions. Precondition for such support was prior notification and if necessary consultation with the contracting parties. In case such consultations failed, the contracting party to whose detriment the support measure was taken could threaten suspension of trade concessions. Moreover, the newly introduced Article XXVIII(*bis*), which provided for negotiation rounds for tariff reductions, acknowledges "the needs of less-developed countries for a more flexible use of tariff protection to assist their economic development and the special needs of these countries to maintain tariffs for revenue purposes". In future negotiation rounds these countries were to be accorded a

[2] GATT Article XVIII, paragaph 4 a allows deviation from the Agreement by contracting parties "the economy of which can only support low standards of living and is in the early stages of development".

more flexible use of their tariffs since they are relevant not only for the industrial development but also for public revenues.

GATT competitor – the founding of UNCTAD

The first special treatment measures for developing countries thus focus on the prevention of balance of payments risks and on the protection of domestic industries. The subsequent years saw efforts with regard to raw materials prices. In 1956, the GATT contracting parties adopted a resolution on Particular Difficulties Connected with Trade in Primary Commodities which *inter alia* demanded an annual status report on the raw materials trade. In 1958, an expert commission installed by the Ministerial Conference of the GATT contracting parties arrives at the conclusion that "there is some substance in the feeling of disquiet among primary producing countries that the present rules and conventions about commercial policies are relatively unfavourable to them"[3]. The report stated that the problems of these countries were exacerbated by the agricultural protectionism of the industrialised nations. The panel recommended *inter alia* stabilisation policies against price fluctuations through the establishment of buffer fund and buffer stock mechanism and lower taxes on primary products in the industrialised nations in order to stimulate demand for coffee, tea and tobacco. In a further declaration from 1961 on the "Promotion of Trade of Less-developed Countries" the GATT contracting parties demanded preferences in market access.

Despite all these activities the developing countries did not consider GATT to be a forum which could adequately take their interests into account. Although the GATT contracting parties made concessions with regard to import restrictions due to concerns about industrial development and balance of payments, when it came to market access and stabilisation of the raw materials prices they remained idle and refused binding obligations. The developing countries started to lobby – successfully – for a new organisation dedicated exclusively to trade and development issues. UNCTAD – the UN Conference on Trade and Development – which was finally established in 1964 became the most important institution with which the Southern governments at that time pursued their trade and world economic objectives. With Raúl Prebisch, one of the outstanding theoreticians of import substitution strategies was named UNCTAD's first secretary-general. Influenced by the founding of UNCTAD, in 1964 a new Part IV dealing with trade and development and encompassing Articles XXXVI to XXXVIII was introduced into GATT. Article XXXVI introduced for the first time the principle of non-reciprocity into the trade regime. That means the contracting parties no longer expected the developing countries to grant comparable consideration for trade facilitation accorded to them. Moreover, Part VI demanded – non-binding – facilitation of market access for products that are of crucial export interest to these countries. This also concerned the so-called tariff escalation, that is customs duties which "differentiate unreasonably between such products in their primary and in their processed forms" (Article XXXVII paragraph 1a).

[3] WTO 1999.

The Generalized System of Preferences

But more importantly, at the UNCTAD-II conference in New Delhi in 1968 the USA agreed to the introduction of the Generalized System of Preferences (GSP) which Prebisch had suggested already in 1964. This system was finally installed by the industrialised nations on a voluntary basis. The USA themselves, however, didn't introduce their GSP until 1975. Since such preferences violated GATT provisions, in 1971 the GATT contracting parties granted the GSP a so-called waiver, an exception to the Most-Favoured-Nation Treatment, limited to ten years. A second waiver concerned those preferences which the developing countries grant each other in the context of the „Global System of Trade Preferences" (GSTP).

The final step on the road towards the official introduction of special and differential treatment for developing countries was taken in 1979 with the adoption of the so-called Enabling Clause[4] during the GATT Tokyo Round. This clause encompassed a) preferential market access for developing countries on a non-reciprocal and non-discriminatory basis, b) differential and more favourable treatment of developing countries with regard to GATT provisions on non-tariff barriers, c) the conclusion of preferential agreements between developing countries and d) special treatment of the so-called Least Developed Countries (LDC). As a concrete measure the Enabling Clause provided that GSP and the preferential agreement between developing countries be exempt from Article I of GATT (Most-Favoured-Nation Treatment). That means, the time limitation of the Most-Favoured-Nation exemption for the GSP was withdrawn and thus the exemption became permanent.

The Enabling Clause meant a better legal integration of special treatment, however, it did not move beyond legally non-binding measures. Moreover, GSP continued to be merely voluntary and the extent of the preferences could be determined by the industrialised nations. Michalopoulos (2000:8) concludes that "the Enabling Clause was a summation, rather than an extension, of the efforts made since 1954 to address the concerns of developing countries within the multilateral trading system". In addition the Enabling Clause introduced the principle of graduation which is in fact a concession to the industrialised countries that is still highly controversial today. Graduation is the GATT contracting parties' agreement that the preferences expire as the economic development of the countries concerned progresses. Thus, successfully developing economies would be subject to the same rights and obligations of the multilateral trading system as industrialised countries. Since according to the Enabling Clause preferences under a GSP are granted unilaterally and are non-binding, the developing countries have no legal recourse against the withdrawal of their preferences.

[4] The official title reads: "Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries", Decision of 28 November 1979, L/4903.

2.2 The Change of Special Treatment During the Uruguay Round

The immense political changes during the 1980s also left their mark on special treatment. The effects are visible above all in the Uruguay Round of GATT, concluded in 1995 with the establishing of the WTO. Since the late 1970s the countries of the South witnessed a transition from domestically oriented import substitution to foreign-trade oriented integration into the world market[5]. Burdened by foreign debt and pressured by the structural adjustment programmes of the international financial institutions, the governments adopted monetaristic measures: restrictive monetary policy, priority of the struggle against inflation, budget cuts, privatisation, wage cuts, withdrawal of the state and last but not least, increased opening towards the world market. Trade barriers were lowered, incentives for foreign investment were created and export efforts were increased. Politicians increasingly submitted to the demands of the global location competition. For Whalley (1999) one of the reasons for this change is the young generation of trade politicians in Latin America and Africa who had been educated in the USA or in Europe and who were convinced of the advantages of free trade and unilateral liberalisation. The success of the Asian "tiger economies" such as South Korea, Taiwan, Hong Kong or Singapore strengthened their conviction that foreign-trade-oriented development could well be possible and successful[6].

However, the concessions granted so far in the framework of the multilateral trade systems had had much less impact than had been hoped for. Agriculture had remained outside of GATT giving industrialised countries the possibility to maintain import barriers and subsidise their exports in a trade-distorting way. Tariff escalation, that is the fact that tariffs rise with each degree of processing, prevented emerging economies from moving from one value-added step to the next higher one. In addition, they were increasingly confronted with non-tariff barriers such as the Multifiber Arrangement (MFA) which severely regulates the textile and clothing trade or the so-called "voluntary export restraints" which the industrialised countries forced upon exporters of shoes, iron, steel and other processed goods. And the success of the GSPs remained modest. In the first ten years, that is between 1968 and 1978, less than 11 percent of the eligible tariffed exports benefited from preferential treatment due to the exclusion of many products, the concentration of very few beneficiaries[7], restrictive rules of origin and restrictive application of safety provisions. Plus there was the inherent insecurity of the GSP because countries could be excluded or their eligibility could be withdrawn on the basis of graduation (Oyejide 2002).

[5] There were important external factors for this change since 1973: the system of fixed exchange rates had been abandoned, there had been two oil price shocks and the increasing volatility of other raw materials and last but not least the debt crisis of 1982 following the rise of interest rates by the Reagan administration.

[6] This conviction was strongly supported by extensive studies of Western think tanks such as the OECD or the US-based National Bureau of Economic Research which tried to prove the inefficiency of import substitution and of the protection of infant industries.

[7] More than 50% of the GSP preferences concerned Brazil, Hong Kong, Korea and Taiwan (Michalopoulos 2000).

Faced with these trade-distorting measures and a re-enforced interest in export-driven growth the developing countries considered it more important to tame Western protectionism with multilateral rules than to demand more liberties for themselves. UNCTAD VI which in 1983 served as a preparation for the Uruguay Round marked the crucial turning-point in the attitude of Southern governments towards the multilateral trading system. At this conference the demand for unconditional equal treatment on the basis of the Most Favoured Nation principle found broad support. It was hoped that the reciprocity of obligations would be more beneficial than special treatment for weaker world market participants (UNDP 2003).

Diverging interests

This new attitude towards the multilateral trade system and the transition to world-market oriented competition strategies shaped the negotiations of the developing countries during the Uruguay Round. Their participation in the GATT rounds had steadily increased. Whereas 25 developing countries had participated in the Kennedy Round (1963-1967), in the Tokyo Round (1973-1979) there were 68 and in the Uruguay Round (1986-1994) there were 76 developing countries. In contrast to earlier negotiations they acted less like a block during the Uruguay Round but increasingly pursued their individual national interests. This became particularly conspicuous during the agriculture negotiations and with the formation of the Cairns Group of export nations where countries with a strong a interest in market access such as Argentina, Brazil or Thailand were actively involved. At the same time, countries that were net importers of foodstuffs feared rising import prices if the Cairns Group were to achieve its goal of far-reaching agricultural liberalisation. That means developing countries held opposite positions with regard to the same issues.

With regard to special treatment they tried to maintain the existing achievements rather than to expand them. The then codified commitments concerning special and differential treatment were used above all to wrest concessions from the Western governments. The developing countries' top priorities were textile trade, agriculture and dispute settlement procedures. They were considered particularly successful with regard to the integration of agriculture and textiles. Moreover, in view of the fact that on the one hand this group of countries became increasingly more heterogeneous and on the other hand some of the Asian countries recorded immense growth rates, the idea to re-focus special treatment on the Least Developed Countries (LDC) gained ground. Nevertheless, the Southern governments stood united on one issue: they all opposed trade in services and intellectual property rights, both issues that had recently been introduced into the negotiations. During the Uruguay Round the industrialised countries put heavy pressure on the South, threatening graduation resp. suspension of GSP benefits (Whalley 1999).

In the end, Southern opposition to the expansion of the negotiation agenda remained futile. Consequently a new question moved into focus: How can new trade rules regarding agriculture, services, intellectual property rights and other issues that had been

introduced into the Uruguay Round, be harmonised with the demands of special and differential treatment? This question has remained a challenge until today since the trade law laid down in the WTO agreements moves far beyond the traditional "border measures" of the GATT era such as tariffs and quotas. Rather, WTO agreements on agriculture, services, intellectual property rights, subsidies and anti-dumping measures intervene in often highly sensitive areas of national sovereignty.

This expansion of trade law is often considered a function of the so-called deep integration of single-state policies which has been accelerated in the course of globalisation. Deep integration demands international harmonisation or mutual recognition of national regulations in order to facilitate cross-border trade and production. According to Birdsall and Lawrence (1999: 133) it is only a logical consequence of deep integration that differential treatment of the developing countries is being undermined: "Agreements that embody adherence to common rules by their nature imply reciprocal obligations."

2.3 Special Treatment in the WTO Agreements

In the course of the Uruguay Round, agreement – also by the Southern governments – on the principle of the so-called Single Undertaking turned out to be crucial to the design of special treatment in the WTO agreements. Single Undertaking meant that all WTO candidates have to accept all agreements of the Uruguay Round as a whole[8.] That was a clear deviation from the previous process under GATT allowing the parties not to join the agreements negotiated in the Tokyo round. Most of the developing countries chose not to sign the agreements on technical barriers to trade, subsidies and countervailing measures, government procurement and customs valuation, which had been negotiated during the Tokyo Round. Consequently these remained plurilateral agreements.

Due to the Single Undertaking special treatment measures underwent a substantial change. While before the Uruguay Round flexibility in the application of the trade rules, the protection of infant industries and the non-reciprocity of liberalisation had stood in the foreground, the special provisions of the WTO agreements focused on three categories: a) extended transition periods or other limits regarding the implementation of the agreements, b) exceptions above all for the LDCs and c) provisions for technical assistance. The provisions of GATT 1947 regarding market access for developing countries and the Enabling Clause which had established a long-term legal basis for the GSP were only included in GATT 1994. Thus, the Uruguay Round in no way changed the already well-known weaknesses of the GSP. The fact that longer transition periods were granted shows that the negotiators were well aware of the insufficient capacities of many countries to implement the WTO agreements. These deficits allegedly were to be rectified by technical assistance.

[8] The only agreements exempted from the Single Undertaking were the plurilateral agreements negotiated during the Tokyo Round on government procurement, on trade in civil aircraft, on dairy products and on bovine meat. The two latter ones are no longer in force.

The observation that in the WTO agreements special and differential treatment underwent a significant change is shared by many analysts, be it from organisations such as the World Bank, UNCTAD, OECD or the WTO itself. For example, a paper by a member of the WTO secretariat states that a requirement for membership in the WTO that "entailed the acceptance of all the Multilateral Trade Agreements meaning that the concept of S & D was weakened from the very start by the approach which was chosen" (Kessie 2002). Laird and Safadi (2001) consider the Uruguay Round as a step towards a „single-tier system of rights and obligations". Special and differential treatment is no longer a long-term acknowledgement of the necessity for development but a "a transitional set of measures over specifically defined time periods to allow developing countries to take on the same level of obligations as the developed countries". In 2002, Oyejide arrived at the conclusion that "the Uruguay Round essentially reduced S&D treatment for developing countries to extended transition periods". Tortora (2003) saw an evolution from a "development tool" to an "adjustment tool". In summary one can say that the reformulation of special treatment in the WTO agreements sparked an intensive debate on the future concept of development-promoting trade rules.

3. Analysis of the Present Impact of Special Treatment

The following assessment of the impact of special treatment is based on the pertinent literature. Since there are so many special provisions in the WTO agreements for which no experience-based data are available, this assessment has merely provisional character. The structure of the provisions follows – with one exception – that of the WTO Secretariat.

An important criterion for the assessment of special treatment in the WTO agreements concerns their binding character. The WTO Secretariat classifies the 155 provisions regarding special and differential treatment as either mandatory or non-mandatory[9]. Formulations containing the word "should" are considered non-mandatory, while those containing the word "shall" are mandatory (WTO 2001a). However, even "shall" formulations, which are theoretically mandatory, can be rather limited in their binding character since they may allow considerable flexibility in their implementation. The Secretariat concedes: "A mandatory provision might therefore not necessarily be effective" (WTO 2002: 2). A further criterion which is relevant for the effectivity of special treatment is the difference between "obligations of result" and "obligations of conduct" (WTO 2001b: 4). Obligations of result determine a certain result while leaving open the means by which this result is being achieved[10]. Obligations of conduct do not set a concrete objective at all[11]. Particularly the obligations of conduct are often rather limited in their binding character.

The Secretariat categorises the current 155 SDT provisions as follows:

a) provisions aimed at increasing trade opportunities,

b) provisions to safeguard the interests of developing countries,

c) flexibility of commitments,

d) transitional periods,

e) technical assistance,

f) provisions relating to Least Developed Countries (see WTO 2001).

The largest category of 49 SDT provisions concerns the safeguarding of interests of developing countries, followed by flexibility (33). The smallest categories concern the increase of trade opportunities (14) and technical assistance (14). Below, the reservations raised regarding every single category, are summarised. Since all five topics in-

[9] The WTO Secretariat presented three documents regarding this issue (see WTO 2001a, b and WTO 2002).

[10] For example the establishment of a bureau where foreign exporters are provided with all trade-relevant information of the importing country.

[11] This is the case for example with special provisions which during implementation of the WTO agreements allow the consideration of specific needs of developing countries.

clude special provisions for Least Developed Countries there will be no separate assessment of the LDC provisions. Rather, they will be dealt with in the discussion of five categories. In a next step the negotiations of the Doha Round regarding special treatment will be documented. The present chapter will be concluded with a summary evaluation of the experiences so far with special and differential treatment.

3.1 Increase of Trade Opportunities/Market Access

The Enabling Clause, GATT 1994, the Agreement on Agriculture, the Agreement on Textiles and Clothing and the General Agreement on Trade in Services (GATS) contain provisions on market access for developing countries.

Most of the altogether 14 provisions in this category are voluntary in character and accordingly are rather vaguely formulated[12]. Three of the market access provisions, however, are classified as mandatory by the Secretariat: Article 2, paragraph 18 of the Textile Agreement, which however has been integrated into GATT as per 1.1.2005, and GATS Article IV, paragraphs 1 and 2 (WTO 2001: 6).

Article IV of GATS provides a telling example of the limited range of even the mandatory provisions. Paragraph 1 reads:

> "The increasing participation of developing country members in world trade shall be facilitated through negotiated specific commitments (...)."

Kessie (2002: 8) points out that this "mandatory" provision can at best be interpreted as a commitment to take up market access negotiations, a right which all GATS contracting parties have anyway. If at the end of such negotiations the market access expectations of a developing country were not fulfilled, a complaint with the dispute settlement board would most likely be futile. Since this article does not provide a certain result it illustrates the limited binding effect of an obligation of conduct even though it is classified as mandatory.

The Enabling Clause which created a long-term legal basis for the GSP was integrated into GATT 1994 and thus into the WTO. This, however, did not change the voluntary character and the unilateral granting of preferences. The industrialised countries may unilaterally modify, expand or limit the GSP or change the group of beneficiaries via graduation. This unilateral handling means that the beneficiaries are kept in a permanent state of insecurity as to the extent and the duration of the preferences, which severely limits their usefulness of the preferences. Currently, 16 countries have notified UNCTAD of a GSP[13]. They grant the beneficiaries lower or sometimes zero tariff for selected products compared to the most preferred tariffs. The LDCs are accorded even

[12] This type of provision is commonly called "best endeavour" in the Anglo-American literature.
[13] Australia, Belarus, Bulgaria, Canada, Czech Republic, European Union, Hungary, Japan, New Zealand, Norway, Poland, Russian Federation, Slovakia, Switzerland, Turkey, and the USA.

further benefits. The EU established their GSP in the year 1971. It is valid for ten-year periods; the current GSP runs out in 2005. In addition to the GSP there are further preference agreements for certain groups of countries. For example the EU grants the ACP countries[14] certain privileges under the Cotonou Agreement and the US grants privileges to the Caribbean states under the Caribbean Basin Initiative. These preferential agreements for certain groups of countries are not subject to the Enabling Clause and thus do not enjoy permanent exemption from the Most-Favoured-Nation principle of GATT. They require temporary waivers from GATT Article I, which in turn have to be agreed by the WTO Members[15].

At the first WTO Ministerial Conference in Singapore in 1996, the Members adopted an action plan for the Least Developed Countries. In the follow-up process several industrialised and developing countries expanded existing preferences for LDCs or introduced new specific LDC preferences. In 2001, the WTO counted a total of 29 preferential agreements for LDCs, 19 of those are granted by developing countries or transition economies, 9 by industrialised countries. Among the more recent agreements are the Everything but Arms Initiative of the EU (EbA) and the extended African Growth and Opportunity Act of the USA (AGOA).

Modest successes

There is a general consensus that preferential agreements were only moderately successful. While easier market access enabled some preferred countries to expand their exports, to diversify into higher levels of added value and to reduce their dependency from the export of primary products, others, particularly the LDCs recorded only minimal increases in export activities. For the year 2001, UNCTAD valued the total of tariffed exports from the developing countries into the EU, the USA, Japan and Canada at USD 296 billion, of which products worth USD 183 billion are potentially subject to the relevant GSP. Indeed, only goods worth USD 71.5 billion received preferential tariffs so that in effect the usage rate of the potential preferences amounts to just 39%. That means compared to the total of dutiable exports from the developing countries, realised GSP preferences were only 24.2% - just one quarter. The figures for the LDCs are even more modest. In 2001, their total dutiable exports to the EU, the USA, Japan and Canada amounted to only USD 11.5 billion of which potentially USD 7.3 billion were entitled to GSP treatment. Indeed, only goods worth USD 5 billion received preferential tariffs so that in effect, the usage rate of the potential preferences amounts to just 67%. Of the total of LDC exports realised preferences accounted for merely 43% (UNCTAD 2004).

[14] 77 countries in Africa, the Caribbean and the Pacific.

[15] The reason for this is the fact that the Enabling Clause covers only preferential agreements which are a) general (encompassing all products), b) non-discriminatory (encompassing all developing countries) and c) non-reciprocal. This means country-specific agreements such as the Cotonou Agreement of the EU are discriminatory and thus require a GATT Article 1 waiver.

The share of preferred imports compared to the total imports of the industrialised countries is very meagre. In 1999, of all imports of the European Union only 5% were GSP imports and 1% were preferred imports of the ACP countries subject to the then Lomé Agreement (today Cotonou Agreement). The preferences beyond GSP for the LDCs are entirely negligible (WTO 2001c).

There are a number of reasons for the modest success of the preference agreements, *inter alia*

a) the limited product range due to the fact that sensitive products were excluded from the pertinent GSP (merely a quarter of the entire exports of the developing countries are covered by the GSP);

b) minor decreases of tariffs compared to the most-favoured rates for products which are export-relevant (above all in the agricultural sector there are many top tariffs and a tariff escalation);

c) the intransparent handling of quotas which are assigned to domestic importers who decide themselves whether and from whom they import; one consequence of this is the fact that often quotas are not completely used;

d) the concentration of preferences on relatively few countries among which there are in turn several rather developed ones; in the 1990s, the EU-GSP accorded most of the preferences to China, India, Brazil, Indonesia, Thailand, Vietnam, Malaysia and South Africa[16];

e) the rules of origin which are considered very restrictive and complex and which are crucial above all in the processing industries; for example the EU defines product-specific rules of origin which determine the size of the added value portion of imported pre-products which are exported into the EU as finished products; This portion is mostly limited to 40% to 50%. However, there is the possibility to cumulate pre-products as long as these come from ACP or EU countries. The rules of origin are meant to prevent non-preferred countries from importing products at preferred conditions to the European market by using a detour through GSP countries;

f) insecurity caused by potential graduation of sectors and countries. In the EU for example, a review is performed annually.

g) protection clauses for sensitive products. The EU-GSP knows two protection clauses which – on the initiative of the Commission or of a Member State – allow at any time the exclusion of any product whose import might disturb the market or threaten domestic producers.

h) preference ranges between GSP and most-favoured tariffs are too narrow, thus it is not economical anymore to incur the transaction costs for the market access;

i) and last but not least, supply-side deficits such as lack of competitiveness of the export products, difficulties in complying to standards and norms of the import countries (for example in the area of food hygiene) or little diversification.

[16] However, demanding that preferences focus on the LDC is also problematic since by far the largest number of poor people live in countries such as China or India.

Due to the weaknesses of the preference systems the developing countries demand not only the dismantling of existing tariff and non-tariff barriers but also that the agreements themselves become more permanent, more transparent and more predictable. It was therefore suggested that the preference agreements as well as their specific provisions be integrated into the WTO agreements[17]. Moreover, the Less Developed Countries fear erosion of their preferences. In the long run, the erosion of preferences can weaken the relevance of the GSP and other trade-political preference systems. To the extent to which the most-favoured tariffs are being generally decreased the preference tariffs will lose significance. Firstly, the preference range between GSP and most-favoured rates will be reduced and secondly, the number of products covered by the GSPs will fall when their tariffs are reduced to zero. UNCTAD (2003) however cautioned against overemphasising this phenomenon since there are still many export products which are subject to high tariffs. This holds true particularly for the agricultural sector where adoption of the Agreement on Agriculture generated a rather unequal tariff structure with marked peak tariffs and tariff escalation. It also applies to many of the products of the processing industries such as textile and clothing.

The doubtlessly meagre success of the preference agreements, however, should not lead to the conclusion that we should do away entirely with the preferences and that the developing countries should pursue a lowering of multilaterally bound most-favoured tariffs. This may be a viable option for some of the more competitive emerging economies, for many of the less developed countries it is not. For them preference agreements can indeed contribute to their overcoming their incompetitiveness and to broaden their undiversified range of export products. The revenues from exports allow them to make the investments necessary to balance out productivity deficits and to explore new export options. Even in recent years there has been a number of countries which were able to use preferences for these objectives. A case in point are the African LDCs Lesotho and Madagascar who managed to increase their exports significantly under the US-American AGOA initiative, also in the area of processed products in the textile and clothing industry. The revenues were used for the modernisation of this sector (UNCTAD 2004: 250). The Lomé Convention facilitated the export of processed food for Malawi, Tanzania, Senegal, Madagascar and Uganda. It enabled Mali to export leather continuously and in Zambia and Madagascar it promoted the development of the domestic textile industry (UNTAD 2003). Moreover, the Everything but Arms Initiative was used by some Least Developed Countries which do not belong to the ACP group such as Yemen, Nepal, Laos, Bangladesh and Cambodia for preferential export of processed goods (Brenton 2003).

3.2 Provisions to Safeguard the Interests of Developing Countries

The WTO Secretariat identified 47 provisions in 13 agreements which urge the Members to safeguard the interests of the developing countries. These provisions encompass both measures to be taken and measures to be refrained from. More than half of

[17] For example CARICOM (see WTO document G/AG/NG/W/100).

these provisions are classified by the secretariat as “mandatory” since they contain “shall” formulations rather than “should” formulations (WTO 2001).

There is for example Article 10 paragraph 1 a of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS):

> “In the preparation and application of sanitary or phytosanitary measures, Members shall take account of the special needs of developing country Members, and in particular of the least-developed country Members.“

According to the WTO classification this provision contains an obligation of conduct as there is no defined target. It merely demands that prior to the application of sanitary measures the needs of developing countries have to be considered. These, however, claim that such an assessment of consequences hardly ever happens. For exporters from the South the health and hygiene standards of the industrialised countries present a high hurdle. Very often, their products are rejected at the border because of sanitary reasons[18]. The problem of Article 10 paragraph 1 is the fact that non-compliance is difficult to prove. The claim of an importing country, development considerations had been considered, can hardly be disproved. In case of a dispute the only decision open to the dispute settlement board might be to recommend the adjustment of the measure in such a way that it promotes development (see Kessie 2002). Southern governments, therefore, demand a more pointed version of Article 10, paragraph 1, saying that SPS measures be withdrawn as soon as more than one developing countries is concerned. If a measure is not withdrawn, technical assistance has to be provided in order to enable the exporting countries to comply with the standards of the importing country.

The Agreement on Technical Barriers to Trade (TBT) contains a similar clause. According to Article 12, paragraph 2, the Members “shall give particular attention to the provisions of this Agreement concerning developing country Members' rights and obligations and shall take into account the special development, financial and trade needs of developing country Members”. Just like the SPS Agreement the TBT Agreement contains merely the obligation to review the impact of relevant measures on developing countries. Neither of them specifies the withdrawal or modification of measures should the developing countries succeed in proving their detrimental effect.

Article 15 of the Anti-dumping Agreement[19] is another example. It postulates that prior to the application of anti-dumping measures the Members have to take into consideration the specific situation of developing countries and to explore “constructive remedies”. This article was the basis of a complaint lodged by India against anti-

[18] See also Fritz 2000, p. 31.

[19] The Anti-dumping Agreement concerns dumping by companies. Its full title reads: “Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994”. Dumping by the State (above all through subsidies) is subject of the WTO Agreement on Subsidies and Countervailing Measures.

dumping tariffs that the EU had levied on Indian linen. India claimed that the EU had not fulfilled its obligation to constructively review alternative measures to the anti-dumping tariffs. The WTO Dispute Settlement Body agreed with India. The DSB pointed out that the obligation to review alternatives prior to the adoption of measures does in no way mean that a given suggested remedy, be it price commitments of the exporter or a lower anti-dumping tariff, has to be accepted. The DSB did not elaborate which possible alternatives could be considers "constructive remedies"[20]. Since the article does not mention any development policy criteria on the basis of which either anti-dumping measures are to be withdrawn or certain "constructive remedies" have to be taken, it does not provide effective safeguarding. In addition, many developing countries or exporters simply cannot afford the high costs of lodging a complaint. In view of the many anti-dumping measures being taken up against exporters Southern governments demand the modalities of Article 15 to be clarified[21]. On the other hand, lack of resources and legal framework prevent developing countries from implementing anti-dumping measures against importers. One major hurdle is the proof that serious damage has been inflicted and that this damage was caused by the dumping practice.

3.4 Flexibility of Commitments

The WTO Secretariat counted 50 provisions, in 10 agreements, which grant developing countries greater flexibility in implementation. Most flexibility provisions are to be found in the Agreement on Agriculture (9) and in the Agreement on Subsidies and Countervailing Measures (8).

Flexibility in the Agreement on Agriculture

The Agreement on Agriculture accords developing countries both a lower level of obligations and longer transition periods for implementation. Such a differentiated treatment can be found in all three categories of the agreement: market access, export subsidies and domestic support measures. With regard to market access the developing countries had to lower their tariffs on the average by 24% in the ten years since the Agreement came into force (that is until 2004). By contrast, the industrialised countries had to lower their agriculture tariffs within six years (that is until 2000) on the average by 36%. Here the industrialised countries used the leeway provided by the so-called tariffication demanded by the Agreement on Agriculture, that is the conversion of non-tariff barriers such as quotas and variable tariffs into fixed tariffs. In the course of this conversion they often indicated tariff equivalents which were above the real safeguard level of the non-tariff barriers. The consequence of this "dirty tariffication" is an extremely uneven tariff structure with a number of peak tariffs on sensitive products that are of crucial export interest to developing countries (see Anderson et al.

[20] see "European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India", 30 October 2000, WT/DS/141R.
[21] Since the 1990s, however, even developing countries have increasingly been resorting to anti-dumping measures.

1999). Moreover, there is the clause on Special Safeguard Provisions in the Agreement on Agriculture, which provides for additional tariffs on tariff products when the import quantities cross a certain threshold or when import prices fall below a certain level (Article 5). Since in contrast to the industrialised countries only very few developing countries performed tariffication, the large majority of them cannot apply the Safeguard clause. The OECD countries on the other hand use this option very often.

By 2004, the developing countries had to reduce export subsidies by 24% while the volume of subsidised exports had to be reduced by 14%. However, only few Southern governments are in a position to pay their exporters export subsidies. The industrialised countries were faced with stronger reduction commitments: 36% of export subsidies and 21% of the volume of subsidised products. The Agreement on Agriculture allows continuation of export subsidies if the prescribed reduction commitments for the products in question had been accepted and if this has been noted in the country-specific list of commitments. This option was used by 25 WTO Members, most often by the EU. Subsidies by the EU enable European exporters to offer dumping prices, which could force Southern suppliers out of local or third markets (Wiggerthale 2004).

By 2004, developing countries were to decrease domestic support measures by 13.3%, industrialised countries by 20% by the year 2000. According to the so-called de minimis percentage, in developing countries this commitment concerns only supports whose value surmounts 10% of the entire domestic production value (Article 6, paragraph 4b). In industrialised countries the de minimis threshold is at 5%. But not all measures beyond that threshold had to be included into the so-called Aggregate Measurement of Support (AMS) which forms the basis for the reduction target. This concerns firstly direct payments which are made in the framework of production-limiting measures (so-called Blue Box measures)[22] and secondly measures, of which it is assumed that they have no or little trade distorting impact (so-called Green Box measures). These encompass direct payments, production-independent income support, set-aside programmes and ecological and structural programmes. Southern governments criticise that many of the Blue and Green Box measures indeed have a trade-distorting impact and can lead to dumping. With regard to their own domestic support measures they do not consider Article 6, paragraph 2 of the Agreement on Agriculture sufficient and demand an amendment. This article accords them greater flexibility in the granting of general investment subsidies for the agricultural sector as well as input subsidies for producers with low resource or income levels.

Since the developing countries did not consider the flexibility provisions sufficient they presented several suggestions to reform the Agreement on Agriculture, the most comprehensive of these being the demand for a Development Box. This proposal had been table for the first time in June 2000 by a group of 11 WTO Members[23]. It was

[22] In the EU these are for example head-of-livestock or area premiums.
[23] Proposal by Cuba, the Dominican Republic, Honduras, Pakistan, Haiti, Nicaragua, Kenya, Uganda, Zimbabwe, Sri Lanka and El Salvador on 23 June 2000 in WTO document G/AG/NG/W/13.

again raised in November 2001 in the Doha Ministerial Conference but was not included in the final document. In the meantime, several NGOs have also presented more detailed proposals for a Development Box. Another group of developing countries, the so-called Like-minded Group, presented the most comprehensive of these proposals in November 2002. These proposals illustrate the limitations of the existing flexibility provisions of the Agreement on Agriculture.

They demand, for example, the possibility to levy additional tariffs on import products that might benefit from export subsidies or trade-distorting domestic support measures. For food security reasons there should be the option to entirely exempt certain basic foodstuffs from tariff reduction commitments. Rather than decreasing the externally-oriented protection the tariffs have to be raised flexibly. Moreover, the special safeguarding clause of the Agreement on Agriculture is to be opened to developing countries exclusively who may apply it to any product. Domestic support measures are to be exempted entirely from reduction commitments if the productivity of the agricultural products in question is lower than the global average and their exports amounts to less than 3.25% of the global trade of these products in two subsequent years. The de minimis threshold is to be increased from 10 to 25% for developing countries. Finally, the supporters of a Development Box demand that aid for rural development, employment programmes, food security, poverty reduction, diversification incl. investment and input subsidies for producers with low income become an inherent part of the Green Box of permitted subsidies. Currently, neither of these flexibility provisions is part of the Agreement on Agriculture.

Flexibility in the Agreement on Subsidies

The Agreement on Subsidies also contains a number of flexibility provisions. They are not particularly extensive and define above all the kinds of subsidies permitted in developing countries (Article 27). In contrast to the Anti-dumping Agreement, the Agreement on Subsidies relates to public support measures. There are three categories of subsidies: prohibited, actionable, non-actionable subsidies. Only prohibited and actionable subsidies may be subject to countervailing measures such as the levy of countervailing duties or may be brought before the Dispute Settlement Body. In addition, the Agreement on Subsidies makes an exception for all support that can be retained in compliance with the Agricultural Agreement. Prohibited subsidies according to Article 3 paragraph 1 are both export subsidies and subsidies which give preference to domestic products (so-called import-substituting subsidies). While industrialised countries had to abolish export subsidies by 1998, the transition countries had to accomplish this by 2002 and the developing countries by 2003. Least Developed Countries are, under certain conditions, entirely exempt from this commitment. Import-substituting subsidies, however, had to be discontinued by all countries, including the LDCs. Industrialised countries after three years, transition countries after seven years and developing countries after eight years. The discontinuation of subsidies giving preference to producers in the Least Developed Countries seems questionable in view of the competitive gap. With regard to the application of countervailing measures the developing countries are faced with the same problems as with the Anti-dumping

Agreement: lack of capacities to prove serious damage and high costs of the dispute settlement procedure.

A more thorough analysis shows that the extent of flexibility accorded by special provisions in the WTO agreements is comparatively low. This is particularly problematic in view of the fact that thus on the national level the application of policy instruments which enable targeted protection and measures to support specific social groups is being complicated. The inadequate special protection clause in the Agreement on Agriculture renders the protection of local producers from import floods impossible. Inadequate flexibility of the subsidies provisions in the Agreement on Agriculture and the Agreement on Subsidies impedes targeted promotion of disadvantages groups, producers with low resource and consumers with low income levels. Since the special flexibility provisions are particularly relevant in the struggle against poverty they have to meet the highest standards - which in reality they do not!

3.5 Transition Periods

Almost all WTO agreements allow developing countries greater flexibility by granting longer transition periods for the implementation of the regulations. The only exceptions are the Anti-dumping Agreement and the Agreement on Pre-shipment Inspections. The WTO Secretariat counted 19 such provisions, some of which have already expired. With the introduction of transitional periods the negotiating parties acknowledged the fact that adjustment difficulties during implementation were to be expected. At the same time, however, there was an understanding that once the transitional periods were over, the developing countries would be subject to the same rights and obligations as the industrialised countries, in short – that there would be full reciprocity.

In addition the transitional period accorded in the Agreement on Agriculture and the Agreement on Subsidies, TRIPS, the agreement on trade-related intellectual property rights, includes similar provisions. Least Developed Countries have eleven years to implement the agreement[24], developing countries five years and industrialised countries one year. Developing countries whose legal system does not know the concept of patent rights have further five years. The Agreement on Trade-Related Investment Measures (TRIMS) grants transitional periods of seven years for LDCs, five years for developing and two years for industrialised countries to discontinue prohibited investment requirements. The transition periods of the WTO agreements are not connected to any coherent development policy criteria. In fact, they seem rather arbitrary (Oyejide 2002). The same transition periods are valid for the large and heterogeneous group of developing countries – for WTO intents and purposes a status selected by the countries themselves. Independent of available resources, economic development, existing institutions, legal systems, income levels or political preferences they have to implement the same agreements within a very short period of time.

[24] The Doha Declaration on TRIPS and health of November 2001 prolongs the implementation period for LDCs to the year 2016.

Furthermore, the transition periods do not seem to take into consideration the implementation costs. Implementation of agreements such as TRIPS or SPS requires not only the drafting and adoption of new laws but also significant investments in education and infrastructure. Experts at the World Bank estimate based on their project experience in the areas of customs clearance, hygiene standards and patent rights that the effective implementation of the WTO agreements will surpass the annual development budget of many Least Developed Countries (Finger/Schuler 1999). Even worse: Adjustment costs will be the highest in those countries that suffer from the widest development gap. And the building of institutional capacities accounts for only a portion of the implementation costs. The other portion concerns the political adjustment costs when the externally oriented protection is discontinued: increased competition pressure for the local producers, rationalisation and loss of jobs.

Independent of the question whether the agreements themselves are considered useful, politicians are now faced with the decision whether scarce resources are to invested in the import of WTO law or whether they be used for different purposes. Should a government invest by 2005 or 2006 in the implementation of a patent right system compliant with TRIPs or should it invest in mandatory licenses and parallel imports to provide AIDS medication to particularly sensitive groups? Should it, after only five or seven years WTO membership in concordance with TRIMS, abolish all investment requirements or should it invest in the promotion of its infant industries? The assessment of opportunity costs involved could lead to the conclusion that alternative investments to the import of the WTO law seem to make more sense (see Rodrik 2001: 26). Since preference requirements which aim solely at transition periods do not take these assessments adequately into consideration they, too, limit the flexible choice of targeted policy instruments from which socially disadvantaged groups could benefit.

In view of the fact that so many implementation problems have materialised, these transition periods are too optimistic anyway. Very often, they could not be maintained, be it due to the lack of capacities, lack of support, lack of political will or other policy options. In these cases there is but one solution: to negotiate extension, be it for entire groups of countries[25], be it for individual cases. Several WTO agreements such as TRIMs, TRIPs, SPS or the Agreement on Subsidies give developing countries the possibility to apply for an extension of the transition periods. It remains to be seen, however, whether the extensions indeed lead to the desired implementation. It may well be that the extension only fosters the conviction that alternative measures are required, such as the modification of the agreements themselves (Breckenridge 2002). Most often, technical assistance and capacity building are considered the road to success.

[25] See for example the fact that TRIPS implementation periods were extended for LDCs.

3.6 Technical Assistance

Six WTO agreements and one Ministerial Decision contain altogether 15 provisions regarding technical assistance. Above all, these are agreements that require a high level of capacities for their implementation such as TBT, SPS, GATS, TRIPS and the Customs Valuation Agreement. Article 11 of the Agreement on Technical Barriers to Trade, for example, prescribes that on request the Members mutually assist each other in the development of technical regulations or that they grant under "mutually agreed terms and conditions" assistance with establishing standardising and regulatory bodies[26]. Similarly, Article 67 of the TRIPS Agreement asks the industrialised countries to provide "technical and financial co-operation" to the developing and the Least Developed Countries at "mutually agreed terms and conditions". Similar provisions are in the Ministerial Decision adopted in Marrakech on Measures Concerning the Possible Negative Effects of the Reform Programme on Least Developed Countries and Net Food-Importing Countries[27] which in the course of agricultural liberalisation might suffer from rising import prices for foodstuffs and decreased food aid. In paragraph 3 of the Ministerial Decision, measures are listed which should provide for sufficient food aid and technical and financial assistance to increase agricultural productivity in the countries concerned. The WTO Secretariat considers these provision on technical assistance binding – unlike many observers (WTO 2001b). Binding measures, it is to be remembered, are not necessarily effective measures. There are indeed several "shall" formulations on technical assistance, but it is doubtful that they are enforceable should push come to shove (see Kessie 2002).

Several institutions and facilities deal with technical assistance during the implementation of the WTO and other trade-related agreements. On the multilateral playing field alone there are not only the WTO but also the IMF, the World Bank, UNCTAD, UNDP, the International Trade Centre (ITC), the FAO and more (see Prowse 2002). The diverse activities of these institutions are not necessarily co-ordinated and may well be contradictory when they follow different preferences. Nonetheless, there are a few co-operation projects in which several of these institutions participate, for example the "Integrated Framework for Trade-Related Technical Assistance" (IF) or the "Joint Integrated Technical Assistance Programme to Selected Least Developed and Other African Countries" (JITAP). Moreover, there are further activities on the regional or multilateral level being conducted by public or private institutions. There is, however, no common facility of the developing countries which is dedicated to providing assistance with regard to trade-policy issues – which is being interpreted as an illustration of the diverging interests of the developing countries on these issues (UNDP 2002: 353f.). In mid-2001 the WTO-independent "Advisory Centre on WTO-

[26] The original TBT Article 11, para. 1 reads: "Members shall, if requested, advise other Members, especially the developing country Members, on the preparation of technical regulations."
[27] "Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries."

Law" was founded which offers consulting services with regard to WTO law, support in dispute settlement and training particularly to Least Developed Countries[28].

Technical assistance by the WTO consists mainly of workshops and seminars offered either globally or for specific regional groups of countries. According to its Secretariat, in 2003 the WTO conducted 450 training and assistance measures while there was demand for 1000 such programmes. The measures offered encompass national courses in trade policy, seminars on individual WTO agreements, scientific workshops and, interestingly enough, missions to review national trade policy (WTO 2004). In order to secure funding for these activities the "Doha Development Agenda Global Trust Fund" was established in the Doha follow-up and a number of WTO Members have already made financial contributions to the fund.

An assessment of the technical assistance provided in the framework of the WTO agreements has mixed results at best. According to the UNDP (2003:335 f) it has failed in two respects: Firstly, the assistance measures did not succeed in improving participation of developing countries in the international negotiations. Secondly, the assistance measures were not designed to promote self-determined capacity building tailored to the needs of the developing countries. UNDI identified four causes why so far the assistance measures have failed:

1. They focus on the implementation of the agreements: The high costs of the implementation of the WTO agreements were not taken into consideration in the assistance measures. Therefore, the definition of "technical assistance" is rather narrow in order not to go beyond the inadequate budget. The consequence: the individual measures do not meet the real development requirements and are only moderately relevant, particularly to LDCs.
2. They are dominated by donor interests: Technical assistance follows the priorities of the donors, not the requirements of the local beneficiaries. Thus it undermines the development of existing local capacities, prevents the possibility to set other priorities and from time to time erects unnecessary bureaucratic hurdles. Technical assistance replaces local institutional arrangements rather than promoting their transformation into development-promoting entities.
3. They are open-ended: Many WTO provisions on technical assistance require negotiations since they are granted only after "mutually agreed terms conditions" have been agreed upon. These negotiations are sometimes abused for inveighing concessions in an extended WTO agenda. The assistance measures themselves are often highly complex and require additional negotiation capacities on the part of the beneficiaries. And finally despite their binding character, there are hardly any mechanisms to guarantee implementation.

[28] Currently, the Advisory Center has 37 members comprising 10 industrialised nations and 27 countries which are entitled to receive support from the Center. Least Developed Countries, which are WTO Members or Accession Candidates, are also entitled to the Center's services (see www.acwl.ch).

4. They are based on inadequate provisions: The WTO provisions on technical assistance do not take into consideration the differences between the developing countries. The mostly know only two categories: Least Developed Countries and developing countries. And the WTO resources are inadequate to meet the demand for assistance.

3.7 Special Treatment in the Doha Round

The increasing acknowledgement that many of the new regulations were not adequate to the legal, institutional and economic capacities of the developing countries led to the fact that in 1999, even prior to the WTO Ministerial Conference in Seattle, several governments presented a number of suggestions regarding "implementation issues". The draft of the final declaration, which was never adopted since the Conference failed, contained more than 50 such unsolved implementation issues – ranging from unredeemed obligations to inadequate transition periods. The sheer number of implementation issues illustrated that the instrument „special and differential treatment" was inadequate to build the necessary capacities for the implementation of the WTO agreements. After Seattle had failed, these issues remained on the agenda. For many developing countries the close connection between inadequate special treatment and implementation problems became one of the crucial issues they introduced to the WTO Ministerial Conference in Doha in November 2001. One result of these efforts is the fact that the working programme of the negotiation round decided upon in Doha puts enormous "verbal" weight on development questions. The programme has ever since been known as the Doha Development Agenda.

Paragraph 44 of the Ministerial Declaration of Doha demands that all provisions regarding special and differential treatment shall be reviewed with a view to strengthening them and making them more precise, effective and to operational[29]. Moreover, the Ministerial Declaration acknowledges the proposal by a group of 12 developing countries[30] presented shortly before the conference and demanding a framework agreement on special and differential treatment. In addition, the Ministerial Declaration gives high priority to the implementation issues and emphasises the commitment to find adequate solutions. Of the approximately 100 points that the developing countries had raised, 40 issues were adopted in Doha concerning the various WTO agreements. The Declaration on Implementation-related Issues and Concerns, however, contains only the less controversial issues (WTO 2001f). Above all, there are no proposals requiring modification of the agreements. All issues that had not been settled were included in the working programme of the Doha Round.

Paragraph 12 of the Declaration on Implementation-related Issues also assigned to the Committee for Trade and Development three tasks regarding special treatment:

[29] "We therefore agree that all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational" (WTO 2001d).
[30] Cuba, Dominican Republic, Honduras, India, Indonesia, Kenya, Malaysia, Pakistan, Sri Lanka, Tanzania, Uganda, Zimbabwe (WTO 2001e).

Firstly, the identification of non-binding provisions, which according to the WTO Members have to be converted into mandatory provisions, and secondly, the review of additional ways in which special and differential treatment provisions can be made more effective and assist developing countries. The third task was to brainstorm how special and differential treatment may be incorporated into the architecture of the WTO rules. With regard to the first two issues, the Committee was asked to present to the General Council "clear recommendations for a decision" by July 2002 (WTO 2001f).

Some observers see the fact that the Doha decisions accord high priority to special and differential treatment and to implementation issues as a departure from the trend to interpret special and differential treatment ever more restrictively – a trend that had been dominant since the Uruguay Round. With the integration of special provisions into the Single Undertaking this issue had for the first time become object of multilateral trade negotiations (see Tortora 2003). Others see the Doha mandate as an expression of the attempt on part of the developing countries to give at least some of the 155 special provisions a more binding character and thus approach their original expectations (ICTSD/IISD 2003). The negotiations so far, however, do not give cause for unbridled optimism. Due to several conflicts only little progress has been made.

Conflicts regarding the mandate

The Trade Negotiations Committee (TNC), which was established to co-ordinate the Doha Round, determined that the mandate to review all provisions on special and differential treatment has to be performed in so-called Special Sessions of the Committee for Trade and Development. These Special Sessions, however, did not succeed in agreeing on the report to be presented by July 2002 containing "clear recommendations for a decision". Consequently, the General Council extended the deadline to December 2002 and subsequently to February 2003. But still no agreement was reached. No further deadlines were set before the WTO Conference in Cancun in September 2003. In Cancun itself, the negotiators hoped for an "early harvest". The Ministers were expected to adopt at least 24 proposals from a list of 88 special provisions to be revised. Since the conference failed, there was neither an early harvest nor a new deadline for the report. The so-called July Package, adopted by the General Council in August 2004, set a new deadline. According to the package the Committee on Trade and Development has to present "clear recommendations for a decision" with regard to special treatment by July 2005 (WTO 2004a).

So far, the conflicts among the Members concerned both procedural issues and substance issued of special treatment. The procedural issues arose from conflicting interpretations of the Doha mandate and concerned above all the status of the work of the Committee on Trade and Development. In the opinion of many developing countries, strengthening of special treatment demanded in the Doha mandate implies efficient modification of the WTO agreements which are not subject to trade-offs with sector

negotiations on agriculture, services and intellectual property[31]. They fear that otherwise substantial improvements with special treatment will be made dependent on concessions in areas crucial to them such as agriculture. They claim it is the task of the Committee on Trade and Development to operationalise special treatment. Industrialised countries, however, argue that significant modifications of the agreements can only be made in the framework of negotiations which allow trade-offs. Otherwise the balance of rights and obligations were violated. They thus do not consider the Committee on Trade and Development a negotiating body. Consequently, they raised a multitude of objections against proposals for modifications of the agreements or suggested to assign them to other WTO bodies. Particularly this latter suggestions is considered entirely impractical by developing countries since due to the lack of capacities they will be unable to follow the negotiations in several bodies (ICTSD/IISD 2003).

Conflicts regarding monitoring

A proposal to establish a monitoring mechanism, initially presented in May 2002 by the African Group, was at first the only issue the Members agreed upon. Unlike the sensitive issue on strengthening special treatment an evaluation instrument did not seem to harbour that much potential for conflict. That was a fallacy: It soon turned out that above all the EU and the USA had very different ideas about the functioning of such an instrument than the African Group. Monitoring which may unearth provisions that urgently require revision was not at all in the interest of the two big trade powers. The EU underlined in their reaction to the African proposal that the overarching goal of all proposals has to be promotion of the "integration into the WTO system" rather than cementing an enduring "'second class' membership" (WTO 2002c). Contrary to the intentions of the African Group the EU lobbied for having all proposals regarding special treatment negotiated in the sector-specific bodies (agriculture, TRPS, SPS, etc) and that the monitoring mechanism has to monitor the progress of these talks. This suggestion pursued one objective: to neutralise the Committee on Trade and Development and to assign the mandated review of the special treatment provisions to the monitoring mechanism. In December 2002, the African Group explained unequivocally that the monitoring mechanism was not to be considered an alternative to the Special Sessions of the Committee. Ideally, the mechanism was to start work only after operationalisation of the special treatment provisions was completed by the Committee (WTO 2002b).

Conflicts regarding graduation

A further conflict was sparked by the question what was to be dealt with first: the – now 88 – proposals concerning individual WTO agreements or cross-agreement interdisciplinary questions such as principles and objectives of special treatment. Industrialised countries argued in favour of dealing with the crosscutting issues such as differentiation and graduation between different countries first. They expressed reservations

[31] Among others, the Least Developed Countries, the African Group, India and Brazil support this view.

that countries with substantial differences in development level were to receive the same privileges under special and differential treatment. Although some governments such as the African Group signalled that they were open for such suggestions they still insisted - just like the other representatives of the South - that at first the agreement-specific special provisions have to be strengthened and operationalised according to the Doha mandate. The background of this sensitive issue is the fact that the WTO does not provide criteria for the category "developing country" and that the Members themselves chose their status[32]. An exception is the category Least Developed Countries which is defined by the United Nations. Out of 50 LDCs currently 32 are WTO Members.

Graduation is a very complex issue that brings into focus not only the vested interest of Northern governments in reciprocal obligations but also the diverging interests of the developing countries. The call for graduation is often accompanied by the tendency to focus special treatment more and more on the Least Developed Countries. This development began with the Enabling Clause in 1979, which for the first time provided for the withdrawal of preferences with increasing development thus paving the way for concentration of special treatment on the Least Developed Countries. This tendency was strengthened with the weakening of the instrument during the Uruguay Round. This process holds incalculabilities for basically all less developed countries. Least Developed Countries who with graduation decided by the UN would lose not only their special treatment in the WTO but also all other LDC-specific trade preferences might be faced with a tough adaptation process. Since the call for a smooth transition, bolstered by a step-by-step discontinuation of preferences and compensation mechanisms has consistently been ignored, most LDCs fear graduation (see UNCTAD 2002). That means, there is no real incentive to move beyond status of LDC. This is clearly counterproductive from a development-policy point of view.

But even economically more advanced developing countries or emerging economies are faced with comparable imponderabilities. If special treatment is further differentiated and focuses on LDCs they might also lose their current privileges - a tendency which was quite visible in the more recent revisions of the GSPs. In addition, this situation becomes even more complex by the fact that each country carefully assesses the impact of differentiation on its individual competition situation. If due to differentiation of the status of the developing countries one country loses its preferences while another one maintains them, the competition situation between these two countries may change substantially. For some of the economically more advanced emerging economies special treatment that focuses on the Least Developed Countries may be advantageous because increasing reciprocity of obligations might weaken their potential competitors in this heterogeneous category of developing countries. For economically less advanced countries, which do not belong to the category LDCs, however, a cutback of special provisions might bring extensive disadvantages. Tortora (2003) sums up the considerations of developing countries in a single question: "How can graduation criteria protect my trade interests by eliminating competitors?"

[32] In accession negotiations, however, other Members can object to the self-categorization of the prospective Member.

The issue of graduation shows the difficulty to achieve “stronger” or “more efficient” special provisions in view of this highly complex net of interests. Whatever solutions are being suggested, they all hold the risk that they do not present a win-win-situation for everybody. Hoekman et al. (2003) point out that in the logic of the negotiations “the depth of the preferential treatment granted will be inversely related to the number of eligible countries”. Graduation moreover highlights two deficits of the current debate: Firstly, the discussions about graduation and differentiation look at the entities of countries and tend to be blind towards social conditions in the individual country and their development needs. Secondly, many of the contributions to this discussion focus on issues such as competitiveness, market access and trade preferences. This threatens to push other categories of special and differential treatment which aim at greater flexibility, protection of the domestic economy and self-determined capacity building into the background.

3.8 Summary: Experiences with Special Treatment

An analysis of the experiences to date with special and differential treatment in the WTO agreements illustrates that these instruments have only been marginally successful. The transformation of special treatment from a development to an adjustment tool has by no means increased its impact as can well be seen in the inadequate transition periods. A review of the different categories of this instrument and of the current negotiations of the Doha Round provides the following findings:

- Anchoring the Enabling Clause in the WTO agreements did not help to fulfil the expectations connected to the GSP and other preferential agreements. While some countries succeeded in using market access to their advantage, the deficits of the GSP remained which had been known before founding of the WTO. Above all the insecurity inherent in graduation considerably weakened the instrument. In the future, even greater insecurity is to be expected due to the general erosion of preferences following general lowering of the tariffs. It remains to be seen how strongly this process will affect the more strictly protected sectors such as agriculture. The weaknesses of the GSPs, however, do not justify the general discontinuation of this instrument. Rather, more comprehensive reforms towards greater reliability are called for.
- The special provisions to safeguard the interests of developing countries as they are, for example, contained in the SPS, TBT or the Anti-dumping Agreement turned out to be inefficient since they are not enforceable in the dispute settlement procedure despite their binding character. They are mostly limited to the obligation to assess possible impact on the developing countries but do not prescribe development policy criteria with which to determine prohibited measures. In addition, there are resource- and capacity-related limitations which render many countries unable to use these agreements to their advantage.

- The room accorded by flexibility provisions is too small to ensure the application of policy instrument on the national level which allow targeted protection and promotion measures for disadvantaged groups. Case in point is the inadequate subsidies regulation in the Agreement on Agriculture and the Agreement on Subsidies. These weaknesses are exacerbated by the fact that it is the industrialised countries who benefit above all from safeguarding provisions such as the special protection clause. The deficits of the flexibility provisions are particularly alarming due to their high relevance for all measures regarding the struggle against poverty.
- With the introduction of transition periods during the Uruguay Round the Members acknowledged that implementation problems were to be expected, nevertheless they cemented the concept of full reciprocity that has to set in right after discontinuation of the current norms. Widespread implementation problems, however, illustrate the inadequacy of both the transition periods and of the agreements themselves with regard to a wide range of development priorities. Furthermore, the transition periods in no way reflect the opportunity factors the decision makers have to consider in view of scarce resources which may highlight sensible alternatives to the import of WTO rules.
- Technical assistance granted in the context of special and differential treatment suffers from the fact that it focuses on the implementation of partially inadequate WTO agreements and that real adjustment costs are not reflected in the appropriate budgets. Moreover, technical assistance tends to be donor-dominated and thus undermines local priorities and institutional arrangements. Granting of technical assistance is often abused as a negotiation chip and the measures are sometimes overly complex. The result is the fact that they neither improve participation of financially tight countries nor contribute to self-determined capacity building.
- The significance accorded to implementations issues and inadequate special treatment in the Doha Round seems to point at the fact that some developing countries underwent a change of orientation: they are disillusioned about their hope maintained during the Uruguay Round that reciprocal obligations bring progress faster than special treatment. It remains to be seen whether the high priority of this instrument can really halt the trend of more restrictive special provisions. Scepticism is called for: The negotiations regarding this issue indicate that above all the EU and the USA are blocking any modification to the agreements as could be seen in the debate surrounding the monitoring mechanism. At the same time the conflicting interests among developing countries are highlighted by the sensitive issues regarding differentiation and graduation criteria which touch all proposals on operationalisation and special treatment.

4. Proposals for Special and Differential Treatment

After the deficits of special and differential treatment in the WTO had become more obvious, several proposals to strengthen this instrument and to improve its efficiency were presented. These discussions began prior to the Ministerial Conference in Seattle and still continue today. At first sight this debate seems to centre on the technical details of the fine-tuning of the WTO agreements. A closer look, however, shows that the debate is about basic paradigms of development and trade policy and the accompanying theoretical framework. The reform proposal reflects the political, institutional and ideological positions of the proponents.

4.1 From Unequal to Reciprocal Exchange

Many reform proposals originating in World Bank circles, the WTO and other institutions are variations on the same neo-classic theme: non-reciprocity, the argument goes, allows "free-riding", preferences promote short-term "rent-seeking", national economies hurt themselves with externally oriented protection, because it prevents specialisation on competitive products and innovation import. Hoekman et al. (2003: 15) conclude that the "overuse of the 'non-reciprocity' clause has, in the past, excluded developing countries from the major source of gains from trade liberalisation - namely the reform of their own policies". Moreover: "Reciprocity is the engine of the WTO negotiation process." Countries that do not engage in the reciprocal exchange of commitments to liberalise lose not only an important mechanism to reform their own policies but also valuable access to export markets. Reciprocal exchange, Hoekman et al. argue, benefits all the countries which participate in it, "this is one reason why we believe the WTO trade policy rules should apply to all members" (ibid.). Alan Winters (2000) considers special and differential treatment of GATT a "derivative of import substitution". Waiving the basic principles of GATT and of import liberalisation, the argument continues, allowed the developing countries a free ride because it was "a simple and cheap way of purchasing developing country participation in GATT and the Western economic system". Wang and Winters (2000) take trade preferences under fire as they allegedly "teach developing country negotiators to focus on short-term quasi-rents (...) rather than to focus on the long-term needs of assured access for commercially viable products." For liberal economists the quasi-rents generated by preferential tariffs are more or less illegal income as they discriminate against more competitive producers[33].

In this tradition, Hoekman, Michalopoulos and Winters (2003) formulate a reform proposal for special and differential treatment which according to the authors avoids the "fundamental flaw" of non-reciprocal negotiations. This proposal starts from the assumption that the first and foremost element is improved market access – for both

[33] Anne O. Kruger's description of developing countries during the era of import substitution as "rent-seeking societies" sparked a whole slew of studies.

industrialised and developing countries. Market access negotiations should exclusively be based on the Most-Favoured-Nation principle and on the mechanism of reciprocity. The only form of special treatment would be the fact that the industrialised countries have to accept that their markets are open for competitive products from the developing countries. Indeed, the second element contains single corrections to certain ostensibly economically inefficient WTO regulations that allegedly would not pass the cost-benefit-test of some of the less developed countries. These corrections are subject to two conditions: Firstly, there are no „opt out" or exemption clauses for individual agreements or parts of agreements. The only option is re-negotiation of the provisions with the aim to balance out legitimate interests[34]. Secondly, they demand a stronger differentiation of developing countries along criteria which remain to be defined. Without reducing the number of entitled countries, the authors argue, there is little chance to achieve the intended balancing out of interests which in their view should be stronger but not exclusively focused on the LDCs. In addition to reciprocal market access and isolated modifications of rules for a small group of countries there would be technical and financial assistance as a third element.

A very similar proposal to revise special and differential treatment with regard to the Agreement on Agriculture was presented by the International Food & Agricultural Trade Policy Council, which brings together representatives of agro business[35] and international organisations, scientists and high-ranking government officials such as the former EU Commissioner Franz Fischler. The IPC explains the refusal of industrialised countries to agree to more binding forms of special treatment with the fact that the industrialised countries are not really inclined to make concessions for competitive agricultural exports. Therefore it was the lack of differentiation between the developing countries, the IPC argues, which contributed to the inefficiency of special treatment. Consequently, the IPC suggests the WTO use the World Bank and IMF classification based on average per capita income. There should be three categories of countries, each entitled to different aspects of special treatment: "Least Developed Countries" with an average annual per capita income of less than US$ 900.00, "Lower Middle Income Developing Countries" with an average annual per capita income between US$ 901.00 and US$ 3035.00 and "Upper Middle Income Developing Countries" with an average annual per capita income between US$ 3035.00 and US$ 9385.00. The advantage of such a country-specific differentiation would be retention of a unified set of regulations allowing no exemptions. The recent successful WTO complaints of developing countries against the USA and the EU allegedly underlined the benefit of such a unified set of regulations to which also stronger Members have to submit (IPC 2004).

[34] In the agricultural area such a rebalancing would essentially consist of granting the developing countries certain subsidies for rural development. With regard to TRIPS a rebalancing - which is not described in detail - of private interests in patent rights, extraction and bio-prospection with public interests in healthcare, biodiversity and indigenous knowledge is envisaged.
[35] For example Toepfer International, Ölmühle Hamburg, Pfizer, Monsanto, Bunge, Nestlé, Cargill.

4.2 From Country-Based to Issue-Based Approaches

The proposals by UNCTAD staff focus primarily on the issue of differentiation and argue in favour of maintaining non-reciprocal preferences (Laird/Safadi 2001) and of issue- rather than country-based approaches. Tortora (2003) warns that country-specific graduations such as those proposed by Hoekman and others, could generate a two-class system of WTO members: on the one hand the LDCs which are the only ones entitled to special treatment, and on the other hand all others - without any further differentiation. In order to avoid this trap Tortora suggests problem-specific instead of country-specific differentiation. The country-specific approaches define qualitative criteria such as average per capita income, which serve as a basis for the decision of the status of a country. Such criteria, which evaluate the entire national economy, fail to consider the disparities between different regions, different sectors or different social groups in a given country. Problem or situation-specific approaches would define criteria of social and economic development for each trade sector, which would then serve as a basis for the calculation of the need for special and differential treatment. Such criteria could for example encompass supply-side deficits, degree of competitiveness, social and employment structure, regulation capacities or social costs of liberalisation. Such an approach is indeed complex but it could avoid country-specific graduation leading to special treatment being limited to LDCs.

Some approaches regarding the Agreement on Agriculture start from the premise of issue-based differentiation, but continue to use them for country-based classification (Kasteng et al. 2004) or try to integrate issue- and country-based approaches (Stevens 2002). In a study for the Swedish Agricultural Ministry Kasteng et al. (2004) propose a reorientation of SDT provisions on agriculture according to the criterion of food security. Thus they arrive at five categories of countries: Least Developed Countries, countries with food insecurity, countries with specific deficits in rural development, significant net agriculture exporters and advanced developing countries. Stevens (2002) also uses food security as a starting point and discusses country-specific differentiations with regard to their vulnerability to WTO provisions. Criteria for such vulnerability could be the GDP percentage of agriculture or average per capita calorie availability. A further criterion could be the share of a country in the global agricultural trade.

Singh (2003), just like Tortora, refuses country-specific differentiation approaches. He criticises above all that Hoekman et al. (2003) do not provide an economic argument for selective special treatment to replace the universal concept which is available to all developing countries. As long as it is not proven, Singh argues, that universal special treatment causes greater economic costs in the industrialised countries than a selective concept, it would seem that the differentiation requirements are nothing but an attempt to divide the developing countries. There are no studies which indicate the level of such costs, Singh says. As long as import floods can be controlled with multilaterally agreed protection clauses it is unlikely that a universal system would cause significant costs in the industrialised countries, Singh claims. If the demand for selectivity is not a tactical move it is at least a mercantilistic fallacy. Thus Singh demands development-promoting special treatment, re-negotiation of problematic agreements and an opt-out

clause if these re-negotiations do not lead to a satisfactory result. Developing countries should be allowed to participate in the multilateral trade system in the old "GATT à la carte" fashion (Singh 2003: 29).

4.3 From a Market Access Perspective to a Development Perspective

Rodrik (2001: 34) demands above all a change of paradigm of the WTO from a "market access perspective" to a "development perspective". This however, according to Rodrik, is made impossible by the current negotiation logic. No doubt, access to the markets of the industrialised countries is important, but the autonomy to experiment with different institutional innovations is equally important, Rodrik argues. He considers the WTO practice to exchange reduced political autonomy in the South for market access in the North a bad deal. Developing countries should not articulate their needs in the framework of market access but in the framework of the political room they require. Rodrik's warning to focus exclusively on market access reflects the doubt about the liberal theory that there is a positive linkage between foreign trade liberalisation, growth and reduction of poverty[36]. Rodriguez' and Rodrik's analysis (2002) of studies which claim growth being induced by trade liberalisation showed that these studies contained considerable methodological flaws. According to this analysis, the only linkage is the fact that countries lower their trade barriers as they become more affluent. Therefore, the integration into the global economy is not a precondition for but the result of a successful growth strategy.

This finding is corroborated by the historical comparison (Chang 2003) of the trade and industrial policies of current industrialised countries which opened themselves to the world market after they had, for The individual countries had used different policy mixes comprising intervention, subsidies and product-specific tariffs. The institutional diversity, illustrated in country-specific combinations of orthodox and innovative policies, seems to be a significant precondition for any form of development. Premature integration into a uniform set of trade policy rules, however, prohibits experiments with innovative institutional arrangements. Accepting reciprocal liberalisation commitments prevents pursuit of development-friendly strategies. Thus, these recent economic and historical studies argue for a new form of special and differential treatment which aims above all at the greatest possible degree of flexibility in the acceptance or refusal of liberalisation commitments. Such an instrument can only be achieved if there is a critical debate on the fetishisation of market access gains – which is predominant in the industrialised but also in many developing countries.

4.4 Proposals by Developing Countries

So far, the African Group, the Least Developed Countries and a group of 12 Central American, Asian and African countries have submitted comprehensive proposals to

[36] This connection is for example suggested in a controversial World Bank study by Dollar and Kraay (2001).

strengthen special and preferential treatment. These proposals encompass both basic principles of special treatment as well as detailed demands for modification of the SDT provision in the individual WTO agreements. The proposals, however, lack a conceptual framework for the delicate issue of differentiation between developing countries.

Prior to the Doha Ministerial Conference, a group of 12 developing countries[37] demanded a framework agreement on special and preferential treatment (WTO 2001e). The group's proposal addresses some of the crucial deficits of special treatment in the WTO agreements and lists adequate remedies. The framework agreement should contain not only objectives and principles but also the following:

- special treatment should be legally binding and enforceable before the Dispute Settlement Body;
- each future agreement should provide for an evaluation of the development dimension according to verifiable goals (such as the UN Millennium Development Goals);
- each future agreement should contain a cost estimate for financial and technical assistance;
- transition periods are to be linked to objective economic criteria (debt level, industrial development, Human Development Index, etc.) and social criteria (literacy level, life expectancy, etc.);
- trade policy measures in developing countries must not be prohibited unless there is a clear proof of trade-distorting effects;
- the principle of "Single Undertaking" is not automatically to be applied to developing countries.

In the context of the discussions that have been going on in the Committee for Trade and Development since 2002, the Least Developed Countries also presented a proposal to strengthen special treatment (WTO 2002a). It contains four elements: Firstly, existing provisions should not only be operationalised but new measures should be implemented, such as diversification assistance and debt relief when preferences erode. Secondly, the LDCs demand that in each WTO agreement the four areas, trade in goods, services, intellectual property and dispute settlement, contain development benchmarks so that the effectiveness of special treatment can be better measured. Thirdly, the implementation costs of each agreement for each developing country should be calculated and funds should be provided accordingly. Fourthly, the LDCs demand exemptions from agreement provisions that curtail their flexibility in pursuing social and economic objectives.

[37] Cuba, Dominican Republic, Honduras, India, Indonesia, Kenya, Malaysia, Pakistan, Sri Lanka, Tanzania, Uganda, Zimbabwe (WTO 2001e).

The African Group is most active in the Committee for Trade and Development. It not only submitted a concept that was revised several times (WTO 2002b) but also individual proposals such as the monitoring mechanism[38] and comprehensive modifications of the agreements. Moreover, the African Group also demands that the binding character of the special treatment provisions be strengthened. It thus suggests converting non-binding formulations into binding ones, and it points out that unclear or non-binding special treatment provisions could be subjected to binding interpretation. The General Council could adopt such interpretations with three-quarter majority essentially making them binding components of the provisions in question. The African Group suggests that the Committee for Trade and Development table a draft of such interpretations to be presented to the General Council for decision as stipulated in the Doha mandate.

Last but not least the African Group, the Least Developed countries and the above-mentioned group of 12 developing countries made a number of suggestions for concrete modifications of the special treatment provisions in the individuals WTO agreements. For example, the Group of 12 submitted alternative SDT formulations for the understanding regarding settlement dispute, and the SPS and the TBT Agreements, and the Least Developed Countries for the Textile, GATS and TRIPS Agreement.[39] The most comprehensive catalogue of about 40 agreement-specific modifications was again presented by the African Group (*inter alia* on GATT, agriculture, SPS, textiles, TBT, TRIMS, anti-dumping, customs valuation, import licensing, subsidies, safeguards, GATS, TRIPS and dispute settlement).[40] In addition, Paraguay, India, Thailand, Saint Lucia and Egypt presented papers targeting the special treatment provisions of specific WTO agreements.

Here, the statement of Paraguay is particularly interesting since it provides a rather unambiguous proof of the diverging interests of the developing countries. Paraguay demands that the relaxed market access granted to the developing countries in the Enabling Clause must not discriminate against other exporters. Such discrimination, however, appears, according to Paraguay, when granting preferential tariffs undermines the competitive position of developing countries, which do not enjoy comparable advantages.[41] While these conflicting interests are stated quite clearly, there is also a high degree of agreement – as is evident from the many proposals submitted jointly by the groups of developing countries mentioned. Thus it is this agreement among these large groups of countries, which justifies a more intensive discussion of special treatment.

[38] See above, chapter 3.7.
[39] See WTO documents TN/CTD/W/2 and TN/CTD/W/4/Add.1
[40] TN/CTD/W/28
[41] Paraguay continues "that the Enabling Clause should be applied as an instrument designed to facilitate and promote the trade of developing countries and not to raise barriers or create difficulties for other parties" (TN/CTD/W/5)".

5. Recommendations

After special and differential treatment had been weakened considerably during the Uruguay Round and in the WTO agreements had changed from a development to an adjustment tool, it was only a few years after foundation of the WTO that a reversal of the trend was demanded. Above all African countries, Least Developed Countries, some central American and South-Asian governments brought the necessity for flexible and non-reciprocal trade rules in focus again. This necessity is not only illustrated by the continuing difficulties of many countries to implement the WTO agreements but also by recent economic and historical studies which deeply question the claimed connection between liberalisation and growth. The Southern governments recorded a first victory with the Doha Decision to review special treatment with the objective to strengthen and operationalise the instrument. The Committee for Trade and Development was mandated to draft the proposals.

Despite the fact that the issues have assumed high priority, concrete improvements of the instrument seem to have fallen by the wayside. Above all the EU and the USA refuse to accept suggestions for modifications of the existing agreements and want to grant concessions for special treatment only in the framework of sector-specific negotiations. Clearly, the big trade powers are looking for trade-offs in sensitive sectors such as agriculture and TRIPS. If it was generally accepted that different levels of development and different political preferences require flexible multilateral regulations, it would be out of the question to make flexibility dependent on liberalisation concessions. Better understanding of the necessity for flexible and non-reciprocal trade rules demand a thorough debate. Therefore, a more intensive discussion on special treatment is crucial. As a reminder: At issue is the entire set of rules and regulations which are meant to balance out the disadvantage of developing countries in the trade regime. The concrete design of these rules and regulations will decide whether the objective of a more equitable trade regime is at all achievable. More attention for this issue could strengthen all those countries that strive for the operationalisation of this instrument. At least this increased attention could help prevent a further weakening of special treatment and its focus on a few of the poorest countries.

In this intensified discussion of special and differential treatment some of the issues mentioned above have to be addressed. Firstly, there is country-specific graduation in the WTO, a highly sensitive issue to which the developing countries have not yet presented any proposals. What are the pros and cons for an end to universal special treatment to which all developing countries are entitled? Do we need a more complex differentiation of the category “developing countries” in the WTO in order to make special provisions more efficient? Why should industrialised countries agree to more binding and more efficient special provisions if there is a stronger differentiation? To answer these questions we might look at the experiences with the GSP. In their GSPs the industrialised countries have for many years been using the available differentiation and graduation options, nevertheless these option did not lead to more reliable and efficient rules for the beneficiaries. The proponents of country-specific graduation

therefore should be asked why they believe country-specific differentiation leads to more binding and efficient special provisions. In addition, the quantitative criteria on which country-specific graduation is based (for example average per capita income) should be critically reviewed.

A discussion and further development of situation-specific approaches could be beneficial. They would be an alternative to country-specific approaches according to which countries lose their entitlement to special treatment based on very general macro indicators. By taking into consideration not only the high levels of poverty still prevalent in many even advanced developing countries but also the disparities between regions, sectors and social groups they could underline the demand for non-reciprocal and flexible trade rules. Possibly these situation-based approaches also can help to relativise the hegemony of the market access focus of the WTO. With view to disadvantaged groups and regions they could illustrate the risks inherent in the exchange of limited political autonomy in the South for market access in the North. Situation-specific approaches, however, have as yet not been sufficiently developed. First suggestions start from the demand for food security and relate primarily to the Agreement on Agriculture. Were situation-specific approaches to be developed more systematically as a serious alternative to graduation they would have to be deepened and expanded to other WTO agreements. Such approaches, however, can only be successful when they originate in the developing countries themselves and are supported by civil society actors. Analyses of local conditions, the basis for the determination of the need for special treatment, require effective participation. A debate excluding the developing countries – as we have seen in the country-specific graduation proposals – is entirely inadequate.

Proponents of unified trade rules and reciprocal liberalisation commitments often base themselves on historic and macro-economic studies. These sources of legitimisation, however, provide unambiguous proof of the advantages of neither premature liberalisation nor of the submission to uniform trade rules. On the contrary: More recent studies severely question some of the liberal assumptions. Consequently, they are often disregarded. This deplorable situation might be remedied by a more intensive public discussion of the history of national trade and industry policies and of the questionable assumptions on the linkage between liberalisation, growth and poverty. Moreover, World Bank, WTO and other publicly financed organisations which regularly quote research results should be asked to consider the entire range of scientific knowledge.

Finally, the negotiation process of the WTO offers a number of possible starting points to underline the demand for strengthened special treatment. One demand seems to deserve particular support: The demand of the African Group to strictly separate strengthening and operationalisation of special provisions from the negotiation mechanism of the trade-offs. If special treatment is considered indispensable it must not be made subject to compromises regarding market access. Furthermore, the July 2005 deadline for the presentation of concrete SDT proposals by the Committee on Trade and Development could be used for interventions. It would already be a step in

the right direction if the report to be presented and the individual country proposals were discussed more broadly and thus this negotiation issue received more attention. In this context civil society actors could for example develop demands for a stronger binding character of special provisions.

The concrete proposals for a monitoring mechanism – which have at least generated a basic consensus – or the proposals for a framework agreement on special and preferential treatment could provide further points of departure for a more intensive discussion. The discussion on the framework agreement to which the Doha Declaration refers has not even started. The current proposal by a Group of 12 developing countries is a basis from which the necessary elements of such a framework agreement could be developed. In this context it might be beneficial to look at the experiences with the different proposals for a WTO Development Box.

In sum, the current contributions to special and differential treatment illustrate that the discussion of the past few years on the strengthening of this instrument has not yet advanced very much and a number of the pertinent issues remain to be discussed more intensively. At the same time the WTO negotiation process offers several suitable starting points from which the demand for development-friendly and flexible regulations can be pushed forward. The crucial recommendation, therefore, is to get this entire issue out of its niche existence and to discuss it more broadly with all stakeholders. The following issues and starting points present themselves:

- The consequences of country-specific differentiation, which is more and more frequently proposed in the WTO, need to be assessed. This requires an answer to the claim that a stronger differentiation of the category “developing countries” will really strengthen special treatment. Moreover, the experiences with GSPs need to be evaluated since the GSPs remain unsatisfactory with regard to reliability and efficiency despite all available differentiation options. An analysis of the risks of quantitative differentiation criteria is also desirable.
- Situation- and problem-specific differentiation approaches need to be developed and deepened systematically. The need for special and differential treatment has to be defined based on the requirements of disadvantaged and particularly vulnerable social groups. Situation-specific approaches require effective participation. In addition, they have to be developed for all pertinent trade areas (agriculture, intellectual property, subsidies, investments, services, etc).
- The more recent historic and economic studies on the history of national trade policies and on the ambiguous linkage between liberalisation and growth need to be explored for the development-policy debate on special and differential treatment. They provide valuable findings supporting the need for non-reciprocal and flexible trade rules.
- With regard to the Doha Round strengthening and operationalisation of special and differential treatment has to be pursued independently of country-specific lib-

eralisation negotiations. Efficient special provisions must not be subjected to liberalisation concessions.

- The monitoring mechanism suggested by the African Group must not be abused to transfer strengthening of special treatment to the sector-specific negotiations groups and thus open them for trade-offs.
- The proposals to strengthen and operationalise special treatment to be presented by the Committee for Trade and Development by July 2005 must be publicly appreciated.
- The proposal for a framework agreement on special and differential treatment tabled by 12 developing countries could be taken up and developed further by civil society and other actors. In this context an assessment of the experiences with the proposal for a WTO Development Box would be helpful.

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Germanwatch

We are an independent, non-profit and non-governmental North-South Initiative. Since 1991, we have been active on the German, European and international level concerning issues such as trade, environment and North-South relations. Complex problems require innovative solutions. Germanwatch prepares the ground for necessary policy changes in the North which preserve the interests of people in the South.

On a regular basis, we present significant informationto decision-makers and supporters. On our honorary board, experts from non-governmental organizations, science, politics and business work together. Regional groups in various cities and any experts and committed citizens actively support ur work. Most of the funding for Germanwatch omes from donations, membership fees and project

grants.

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Heinrich Böll Foundation

The Heinrich Böll Foundation, affiliated with the Green Party and headquartered in the Hackesche Höfe in the heart of Berlin, is a **legally independent political foundation** working in the spirit of intellectual openness. It was founded in 1997 by uniting the three foundations Buntstift (Göttingen), Frauen-Anstiftung (Hamburg), and Heinrich-Böll-Stiftung (Cologne).

The Foundation's **primary objective is to support political education** both within Germany and abroad, thus promoting democratic involvement, socio-political activism, and cross-cultural understanding. The Foundation also provides support for art and culture, science and research, and developmental co-operation. Its activities are guided

by the fundamental political values of ecology, democracy, solidarity, and non-violence.

Heinrich Böll's call on citizens **to meddle in politics** is the example upon which the work of the Foundation is modeled. The Heinrich Böll Foundation strives to stimulate socio-political reform by acting as a forum for debate, both on fundamental issues and those of current interest.

To realise the objectives stated in its by-laws, the **Foundation provides encouragement and support to groups and individuals** living up to the responsibility of shaping a more peaceful world, of protecting the environment, and of promoting respect for human rights throughout the world.

The Foundation also **supports research** into the mechanisms of this century's two German dictatorships, thus paving the road for a sustainable democratic future.

The Foundation **promotes a vision of a democratic society open to immigrants** and places particular importance on **attaining gender democracy** - signifying a relationship between the sexes characterised by freedom from dependence and dominance. These collective tasks are significant aspects of both the Foundation's internal structure and public activities. The Foundation's activities strive to promote respect among people of different nationalities, different cultural or sexual identities, and differing political opinions. The educational work of the Foundation also **aims to counter discrimination against lesbians and gay men**.

The Heinrich Böll Foundation's **educational activities** have a political basis, an ethical outlook, and strive to promote various forms of cultural expression. The Foundation supports art and culture, including literary research, as part of its political education work and as a crucial element of each society's self-image. With its support for persecuted artists and its defense of freedom of expression, the Foundation continues in the tradition of Heinrich Böll. A shelter and work space for artists from throughout the world has been established at Böll's former residence in the Eifel region of Germany.

By way of its **international collaboration** with a large number of project partners – currently numbering about 200 projects in 60 countries – the Foundation aims to strengthen ecological and civil activism on a global level, to intensify the exchange of ideas and experiences, and to keep our sensibilities alert for change. The Heinrich Böll Foundation's collaboration on socio-political education programs with its project partners abroad is on a long-term basis. Additional important instruments of international co-operation include visitor programs, which enhance the exchange of experiences and of political networking, as well as basic and advanced training programs for committed activists.

The Heinrich Böll Foundation's **Study Programme** considers itself a workshop for the future; its activities include providing support to especially talented students and academicians, promoting theoretical work of socio-political relevance, and working to overcome the compartmentalisation of science into exclusive subjects.

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