MAKING SPECIAL AND DIFFERENTIAL PROVISIONS OPERATIONAL: IN SEARCH OF AN EFFECTIVE INTERPRETIVE PRINCIPLE IN THE WTO AND RTAs.

By Dr. Delroy S. Beckford

Special and differential provisions have become an integral part of the WTO Agreement, whether in the form of provisions for technical assistance, privileged access to markets or some limited suspension of obligations that applies to other trading partners, in order to permit smooth integration within a context of further liberalization. One concern with respect to these provisions is that they are not being made operational within the WTO. Some provisions are drafted in hortatory language that makes enforcement difficult and, in other cases in which the language is drafted with more precision, no primacy is given to these provisions by WTO panels.

The following discussion highlights some of the issues raised with respect to making S&D provisions operational and the extent to which the proposals suggested can be met within the WTO's current interpretive framework.

The discourse on the significance of S&D provisions have not only centred on their original justification but to what extent the current development agenda can be met without making these provisions effective, and what proposals may be warranted if the WTO's current interpretive framework is not feasible to attain this objective.

Moreover, S&D provisions are not only of significance to developing countries within the WTO 's multilateral framework, but also within RTAs whereby bargains are often struck on the understanding that there be some flexibility in the obligations to be assumed or a grace period for the assumption of obligations. That RTA regimes must be consistent with the WTO means that the WTO's signal regarding the resolution of the interpretive conundrum for S&D provisions will have implications for how such provisions are to be interpreted in RTA regimes.

In many of the agreements interpreted by the Appellate Body, for example, no primacy is given to S&D provisions over other core provisions such as national treatment, MFN, or the prohibition against import restrictions embodied in Article XIII of GATT 1994. Moreover, S&D provisions often compete with procedural and substantive obligations that are not in any sense core provisions, but which are treated as no less important than other provisions in the Appellate Body's interpretation of Members rights and obligations. For example, the invocation of S&D provisions with respect to the applicable burden of proof in dispute settlement has not met with any success. Thus, in the case of **Indonesia-Certain Measures Affecting the Automobile Industry,**[1] Indonesia argued, unsuccessfully, that ' the burden of proof on complainants is higher in this case because Indonesia is a developing country', and that the term 'like product' should be interpreted differently because of Indonesia's status as a developing country. There are, however, examples of some leeway being given to developing countries in procedural matters.

[1] WT/DS54/R, July 1998.

Article 12.11 of the DSU, for example, requires that Panels 'explicitly indicate the form in which account has been taken of relevant S&D provisions that…have been raised by' a developing country Member that is a party to the dispute. The Panel in **US-Offset Act (Byrd Amendment**),[2] by relying on this provision, interpreted an S&D provision in the Antidumping Agreement despite the failure of the parties to the dispute to raise the S&D argument in their request for the establishment of a Panel.[3]

With regard to substantive provisions the record is also mixed, although there is a jurisprudential preference that subordinates S&D provisions. The Appellate Body has repeatedly stated, for example, consistent with its position in **Japan-Taxes on Alcoholic Beverages**,[4] that all provisions in the WTO Agreement must be given effect. Although this means that in an appropriate case S&D provisions must be given effect, it also means that other provisions are to be given effect without any clear guidance as to when and under what conditions S&D provisions are to trump other provisions in dispute settlement.

What is meant by making S&D provisions operational?

This brings to the fore the important issue of what is meant by making special and differential provisions effective or operational. It may mean, for example, that where an S&D provision is raised in a dispute that it should not only be considered but must take precedence to other provisions. It may also mean that Panels should exercise an inherent jurisdiction to consider S&D provisions in disputes pursuant to Article 12.11 of the DSU. Another suggested approach is that these provisions should be interpreted consistent with the Doha development agenda.

Although the exploratory definitions above are not exhaustive of the meaning of operational, each one includes challenges that are not easily surmountable within the WTO's current interpretive framework for the settlement of disputes. For S&D provisions to take precedence to other provisions in disputes, core principles such as MFN and national treatment must be classified as exceptions to S&D provisions thereby subordinating them to S&D provisions within the hierarchy of norms governing dispute settlement. The current structure of the WTO Agreement suggests that this position is untenable. For example, provisions for technical assistance are oftentimes drafted in hortatory language.[5] Where they are drafted in terms of a positive enforceable obligation, enforcement of the general obligations for which the technical assistance is designed to ensure developing country compliance are not made conditional or subject to the obligation for technical assistance.[6] Moreover, S&D provisions permitting assumption of

[2] *United States-Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R.
[3] Arguably, this was a bold move by the Panel because the S&D argument not having been raised for the establishment of the Panel may well have been without the Panel's terms of reference. This means that it is incumbent on developing countries to raise S&D arguments within the context of consultations before the request for setting up a Panel that should also include such arguments in order to foreclose jurisdictional challenges at the Panel stage or on appeal before the Appellate Body.
[4] WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R.
[5] See, for example,
[6] See, for example,

obligations at a later time period indicate the primacy of the obligation for which some leeway has been given.

Alternatively, S&D provisions may be seen as mere exceptions to the general core principles such as MFN and national treatment, in which case they would not necessarily take precedence unless the impugned state conduct falls squarely within the exception. But even where an exception applies the issue of the legality of the impugned state conduct is usually referenced or made subject to core principles of non-discrimination.

Thus, for GATT Article XX exceptions, state conduct falling within any of the exceptions must pass the Chapeau test, that is, the measure to be justifiable must not be applied in an arbitrary or discriminatory fashion. The Appellate Body's interpretation of the Enabling Clause allowing for a Generalised System of Preferences (GSP) also confirms that S&D provisions are subordinated to core provisions even when the challenged state conduct falls within the permissible exception. For example, in the **EC-Tariff Preferences,**[7] the Appellate Body, upholding the Panel's findings, treated the Enabling Clause (which is undoubtedly an S&D provision) as involving a binding legal obligation on donor countries to apply preferences in a non-discriminatory fashion. Although this holding is apparently counter-intuitive in its formulation, the Appellate Body applied the principle of non-discrimination in GSP cases to mean that similarly situated countries must not be treated differently by donor countries.

Not all S&D provisions are directed at developed country Members. Those directed at WTO Members in general include Article 9.1 of the WTO Agreement on Safeguards which stipulates that the interests of developing countries are to be taken into account in the application of safeguard measures. This is to be applied to ensure that safeguard measures do not target developing country imports where the volume of imports is less than three per cent of total imports for the WTO Member imposing the safeguard measure. Where the S&D provision may be interpreted as being directed at the general membership of the WTO it may become meaningless in disputes involving developing countries, as complainant and respondent, if the underlying rationale for such provisions is to ensure a certain threshold level of market access to developed country markets where safeguard measures are to be imposed.

Exercising an inherent jurisdiction under Article 12.11 of the DSU to make S&D provisions effective may lead to jurisdictional challenges on appeal on the basis that the parties, not having raised S&D provisions in their claims with respect to the request for establishment of a Panel, have not made S&D claims as part of the Panel's terms of reference under Article 7.1 of the DSU.

Additionally, to interpret S&D provisions to be consistent with a 'development' agenda in accordance with Ministerial Declarations such as Doha's raises questions about the legal effect of Ministerial Declarations. To be given legal effect a Ministerial Declaration may either be an authoritative interpretation in accordance with Article IX (2) of the

[7] *European Communities- Conditions for the Granting of Preferences for Developing Countries*, WT/DS246/R.

WTO Agreement or an amendment to the agreement under Article X. The terms of Article IX (2), however, suggest that the authoritative interpretation function is not to be used to circumvent the Article X provision for amendment.

Although the authoritative interpretation may be case specific, as in the case when the Appellate Body's interpretation of a covered agreement is deemed to be in breach of Article 3(2) of the DSU, it is conceivable that an authoritative interpretation may arise in a general sense. The difficulty with the latter approach is that WTO Members may disagree as to whether what purports to be an authoritative interpretation is in fact an attempt at amendment that requires a different procedure and acceptance by a greater number of WTO Members.[8] In any event, under Article X:3 of the WTO Agreement, an amendment of WTO provisions, or an authoritative interpretation that has a similar effect, can only bind those WTO Members accepting the amendment.

In fact if the development agenda is to be seen as requiring that in specified instances development should trump principles like MFN and national treatment this would mean that *all* WTO Members would have to accept the Declaration as a *de facto* amendment to MFN and national treatment obligations under the covered agreements.

The difficulty in practice of securing the acceptance of all WTO Members on key Ministerial Declarations such as Doha's suggest that the current structure of the WTO is not amenable to interpreting S&D provisions in terms of a development agenda.

Moreover, development goals that incorporate sustainable development, such as Article 34.1 of the Cotonou Partnership Agreement that sets out one of the key goals of the European Partnership Agreements, may not be readily achievable within the WTO framework even though the WTO Agreement refers to sustainable development as one of its significant objectives.

Relate to RTAs like EPAs

Given the limitations of the WTO's governing interpretive framework for S&D provisions the question arises as to what effect, if any, RTAs may have in their enforcement. Within some RTA arrangements, LDCs are permitted some flexibility in the assumption of obligations and the bargains struck for some obligations are based on a development agenda. To be sure, Article XXIV of GATT 1994 allows, or may even require, RTA Members to liberalize trade at much greater levels than exists within the WTO.[9] Alternatively, liberalization within an RTA may be less than what is required for RTAs to justifiably fall within Article XXIV of GATT, albeit their existence can be

[8] See, for example, WT/GC/W/144, February 5, 1999, p. 2. Here the US objected to the EC's request for an authoritative interpretation of Article 22 of the DSU because it would amount to an altering of rights and obligations.

[9] This would be the position with the RTA Members. See for example, Article XXIV: 8 of GATT 1994 specifying that duties and other restrictive regulations of commerce are to be eliminated on substantially all trade within an RTA.

sanctioned by a waiver. Another approach is to have liberalization in the RTA roughly equivalent to what its Members have undertaken in the WTO.

In the case of the proposed European Partnership Agreements (EPAs), for example, there may be provisions that require liberalization at a level that is 'without prejudice' to the Members' WTO rights and obligations. This latter formulation, while seemingly intuitively comprehensible, requires some explanation. For example, are the rights and obligations those that are represented in the covered agreements exclusive of adopted interpretations by panels or the Appellate Body? This is perhaps the interpretation that may be embraced given that decisions of these bodies are not considered binding other than on the parties to the particular disputes.

This notwithstanding, WTO Members rely largely on previous adopted decisions that clarify rights and obligations under the covered agreements to argue their claims or defenses. It is to be expected then that claims or defenses based on S&D provisions in RTAs may have to pass WTO muster under Article XXIV of GATT 1994.

The foregoing suggests the difficulty of giving effect to S&D provisions, or rather the difficulty in interpreting S&D provisions to trump core principles such as MFN and national treatment. This presents a challenge for meeting trade liberalization and development objectives within the WTO and RTAs.

Interpreting S&D provisions consistent with a development agenda seem to require subordination of the principle of non-discrimination. Non discrimination is, however, the *sine qua non* for trade liberalization. Trade liberalization, therefore, is not seen as necessarily development friendly although development is acknowledged to be somewhat dependent on trade liberalization, even if it may not be a necessary or sufficient condition for achieving that objective.[10]

Where the development agenda includes sustainable development as a worthy policy goal, this too may be affected by the uncertain relationship between the WTO principles and Article XXIV governing RTAs. Principles governing sustainable development may have to be drawn from other international agreements, but these are not cognizable within the WTO unless the rules contained therein are binding on all the parties to the dispute.[11]

If WTO decisions are seen as clarifying rights and obligations, the non-cognizable nature of some sustainable development principles within the WTO's interpretive framework may result in these goals being thwarted at the regional level if these principles cannot

[10] See, for example, Dani Rodrik and Francisco Rodriquez, 'Trade Policy and Economic Growth: A skeptic's Guide to the cross-Country Evidence, Centre for Economic Policy Research, Discussion Paper Series 2143 (1999). He demonstrates that there is little correlation between trade liberalization, economic growth, poverty reduction and economic development.

[11] See, for example, *European Communities-Measures Affecting the Approval and Marketing of Biotech Products*,WT/DS291/R, WT/DS292/R, WT/DS293/R, at para. 7.75. Here, the Panel rejected the application of the precautionary principle in the Cartegena Protocol on Biosafety because not all parties to the dispute are signatories to the Protocol.

achieve more prominence in the settlement of disputes in RTAs than is currently accorded them in the WTO.[12]

Concluding remarks

The foregoing is not to suggest that S&D should be discarded or that a development objective should not be pursued. Indeed, that would be politically infeasible for developing countries, even if in a practical sense S&D provisions are largely unenforceable or superfluous because, for example, they represent soft 'obligations' that would be met in any event by an appeal to moral suasion.

Some of these provisions are, in any event, firmly established within the multilateral trading system, such as the Enabling Clause that constitutes a continuing legal basis for S&D treatment in favour of developing countries with respect to GSP schemes. Again, such S&D schemes do not necessarily trump core principles such as non-discrimination in their application[13] or result in development because industries benefiting may need more time to develop than allowed under the graduation principle or preferences may cover tariff lines where MFN tariffs are low.

Rather, S&D provisions should be drafted in terms that guarantee reciprocity in their observance as well as of the core provisions against which they are usually meant to provide some relief. Conditioning observance of core provisions on the satisfaction of S&D provisions would be an initial step in the process. For example, if no technical assistance is provided to allow developing country firms to be fully equipped to address sanitary and phytosanitary concerns in developed country markets, developing country members should be permitted to avoid the core obligations under the agreement with respect to goods imported from these regions.

This suggestion may be too bold to accommodate in the context of current negotiation ethos. It remains to be seen, however, whether any other approach will achieve a position other than the continuation of asymmetrical outcomes that ultimately militate against the development that is being sought.

[12] This position is on the assumption that WTO decisions in clarifying rights and obligations of WTO Members may influence decisional outcomes in RTAs whose consistency with the WTO Agreement are required under Article XXIV of GATT 1994.

[13] That is to say these schemes albeit discriminatory by definition must be applied in a non-discriminatory fashion with respect to the category of beneficiary countries that may be eligible for those benefits in accordance with the objective criteria required to demonstrate transparency for eligibility.