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Rethinking Special and Differential Treatment in the WTO

Akiko YANAI*

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Abstract

Special and differential treatment (S&D) allows differentiated treatment for developing countries within the WTO system by justifying a deviation from the most-favoured-nation obligation. Since it was incorporated into the GATT (the predecessor of the WTO) in the 1960s, S&D has played a significant role in promoting the integration of developing countries into the multilateral trading system. However, S&D is undergoing complicated and entangled discussion at the current multilateral trade negotiations, the Doha Development Agenda. There are a number of reasons to make opposing arguments in developed and developing countries, among which this paper focuses on two elements: diversification of developing countries and instability of preferential schemes. In order to overcome these problems and in order to make S&D more effective and operational, this paper considers the following alternative approaches: differentiation among developing countries applying the common but differentiated responsibility (CBDR) principle by analogy and codification of a preferential scheme as a multilateral agreement in the manner of North-South RTAs with flexibility.

Keywords: Special and differential treatment, WTO, trade policy, development

JEL classification: F13, K33, O19

* Senior Research Fellow, Inter-Disciplinary Studies Center, IDE-JETRO.

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INSTITUTE OF DEVELOPING ECONOMIES (IDE), JETRO
3-2-2, WAKABA, MIHAMA-KU, CHIBA-SHI
CHIBA 261-8545, JAPAN

Introduction

The World Trade Organization (WTO) assumes the principle of sovereign equality as a bedrock principle, as do other international law regimes. All members of the WTO must comply with the WTO agreements as legally binding regardless of whether they are developing countries or developed countries. However, it is difficult as a practical matter to apply WTO rules in the same way to all member countries, which vary in their development stage. Extra preferences and flexibility regarding trade policy disciplines is necessary for developing countries in order to achieve their development objectives (Yu 2002). Therefore, developing countries have demanded the application of different policies and approaches depending on the degree of development, and this is embodied in the notion of 'special and differential treatment' (S&D).

S&D has played an important role in promoting the integration of developing countries into the WTO system by granting them preferential treatment. As S&D is a result of political compromise, however, both sides, i.e., preference-giving countries (developed countries) and preference-receiving countries (developing countries), tend to implement it arbitrarily. More than forty years has already passed since the notion of S&D was incorporated into the General Agreement on Tariffs and Trade (GATT) in the 1960s. The international trade environment surrounding both developed and developing countries has drastically changed. Under such a situation, a question arises as to the function of S&D: 'Is the current S&D suitable to the existing world trading system?' In order to make the S&D principle more practical and more helpful for developing countries, this paper looks at what S&D is and how it operates in its relevant legal framework (section 1). This paper also considers problems of S&D (section 2) and proposes some new approaches for S&D (Section 3).

1. A Brief Overview of the S&D Concept

S&D allows differentiated treatment for developing countries within the WTO system by justifying deviation from the most-favoured-nation (MFN) obligation. The adoption of S&D was based on the argument that equal treatment could secure equality only among identical parties and that it was only unequal treatment which could correct inequalities between different parties (Rajamani 2006).

1-(1) General Principles of S&D

S&D should be non-reciprocal. Measures that have been recognized as S&D are granted unilaterally to developing countries from developed countries. Reciprocity, which is the fundamental principle of the WTO, does not apply to S&D measures. Furthermore, S&D should be applied in a non-discriminatory manner among developing countries,[1] irrespective of the level of per capita GDP or membership in certain international organizations (UNCTAD 2003b).

The 1979 Enabling Clause provides that the generalized system of preferences (GSP) is recognized as S&D only when it grants preferences for all developing countries. However, some schemes give preference only to specific developing countries having special historical or political relations with the preference-giving country. For example, the EU had given special treatment to the African, Caribbean and Pacific (ACP) countries through the Lomé Convention (1976-2000). ACP countries could access the EU market under conditions that were more favourable than those of other countries with respect to export of agricultural products such as bananas and sugar. ACP countries had also benefited from the EU in the field of investment and financial cooperation.

The Lomé Convention has contributed to economic development of ACP countries and encouraged them to export their products to the EU markets. However, it bestowed preferential treatment on specific developing countries, which violated the non-discrimination principle of S&D. Under the current S&D scheme, giving preferential treatments only to certain developing countries is not permitted. As the only exception, it is possible to grant more favourable special treatment to least-developed countries (LDCs) than to other developing countries.

1-(2) S&D Provisions in the WTO Agreements

Within the WTO legal system, S&D has taken three main forms: provisions providing developing countries with preferential market access in developed countries, provisions allowing for a modulation of commitments, and provisions of technical assistance and other support (IISD 2003). There are nearly 150 provisions relating to S&D spread across the existing WTO Agreements.[2] The WTO Secretariat has classified these S&D

[1] The scope of non-discrimination in S&D is different from the scope in MFN, which is a basic principle of the WTO and covers all WTO members.

[2] Among them, Article XVIII and Part VI of the GATT and the so-called Enabling Clause are particularly fundamental provisions.

provisions into the following six types (WTO 2000: 3-6):

(a) provisions aimed at increasing the trade opportunities of developing country Members; These provisions all consist of actions to be taken by Members in order to increase the trade opportunities available to developing countries;

(b) provisions under which WTO Members should safeguard the interests of developing country Members; These provisions concern either actions to be taken by Members, or actions to be avoided by Members, so as to safeguard the interests of developing country Members;

(c) provisions of flexibility of commitments, of action, and use of policy instruments in rules areas for developing countries; These provisions relate to (i) actions developing countries may undertake through exemptions from disciplines or commitments otherwise applying to Members in general; (ii) a reduced level of commitments developing countries may choose to undertake when compared to Members in general; or (iii) procedural flexibilities (e.g., simpler notification requirements, simpler procedural requirements in trade defence instruments, less frequent trade policy reviews, etc.);

(d) provisions of transitional time periods; These provisions relate to time bound exemptions from disciplines otherwise generally applicable;

(e) provisions of technical assistance and other measures of support (found in several rules areas);

(f) provisions relating to LDC Members; These provisions, whose applicability is limited exclusively to the LDCs, all fall under one of the above five types of provision.

Based on these S&D provisions, developing countries practically enjoy preferential treatment. It can be pointed out as a recent trend that S&D measures such as allowing a modulation of commitments and offering supports are becoming mainstream rather than S&D measures providing substantial and concrete preferences such the GSP.

1-(3) Negotiations on S&D at the DDA

Strengthening S&D is on the negotiating table at the Doha Development Agenda (DDA).[3] All the S&D provisions of relevant WTO Agreements have been reviewed, and a wide range of proposals including those ranging from clarification of the principle,

[3] The Doha Ministerial Declaration confirms in Paragraph 44 that 'provisions for special and differential treatment are an integral part of the WTO Agreements,' and '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 2001a).

the purpose, and the coverage of S&D to specific suggestions on individual S&D provisions has been carried out. The requests of developing countries are summarized in the following two points: (1) importance should be attached to S&D as an integral and inherent objective of the multilateral trading system and (2) an 'S&D regime' should be established with legally-binding force. Since S&D provisions are merely nonbinding targets, developing countries have difficultly securing profits produced by the S&D measures. Therefore, they have insisted that S&D should be defined as being legally binding. This requirement resulted in the request for conclusion of a framework agreement on S&D and the building of a mechanism which could secure the enforcement of S&D (WTO 2001b).

As the background to such a demand, developing countries thought trade liberalization would be only a means for achieving the objective of the WTO, not the objective itself of the WTO. In the preamble of the WTO Agreement, the objective of the WTO is stated as 'raising standards of living, ensuring full employment and a large steadily growing volume of real income and effective demand, and expanding the production of and trade of goods and services.' In order to contribute to these objectives, Member countries take measures such as 'entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations.'

Moreover, the Doha Declaration emphasyzed sustainable development as its core objective and the Work Program of DDA focused on 'enhanced market access, balanced rules, well-targeted, sustainable technical assistance and capacity building programs' in order to help the economic development of LDCs. Developing countries believe that there is no meaning to the reduction of tariff and non-tariff barriers that do not lead to the improvement of living standards. By reaffirming the original objective of the WTO, they argued that functional enhancement of S&D is inevitable.

Various arguments have been made in the DDA negotiation, and many proposals have been submitted. Cancun Annex 28 is the most recent proposal on S&D from developing countries. There have been some important achievements on S&D at the DDA so far, for example, to grant duty-free quota-free (DFQF) market access for products of LDCs, to actively consider waiver application by LDCs and to allow a grace period for implementation of the WTO agreements. However, these outcomes do not lead to reinforcement of the legal infrastructure that developing countries have been demanding, nor has the granting of substantial S&D been realized. Negotiations over strengthening S&D still continue.

2. Problems of the S&D

Various discussions have been held about the problems of S&D. Some of them criticized the ambiguity of the definition of 'developing countries' which determines eligible countries for S&D. There exists no clear and agreed definition of 'developing countries,' except LDCs. Developing country status under the WTO system had been based on the principle of self-declaration.[4] The legal basis of S&D is not clear either. The developmental process of the S&D concept shows that incorporation of the S&D principle was not the codification of an established legal norm but the result of political compromise between developed and developing countries. Even though the Enabling Clause is regarded as a legal basis of a GSP, the legal basis of S&D itself is still ambiguous. Besides these problems, this paper focuses on two other issues: diversification of developing countries and legal instability of preferential schemes.

2-(1) Diversification of Developing Countries

The landscape of the global economy is changing with the growth of developing countries. Emerging economies are becoming a stronger economic presence, and African countries have been increasing their voice by forming interest groups. At multilateral trade negotiations, consensus cannot be formed anymore without the agreement of developing countries. Especially where there are large differences of position concerning issues between developed and developing countries, collision of these two sides has become intense. The S&D negotiation is one such complicated issue.

As for the developed countries, they demand that semi-developed countries or newly emerging countries should assume appropriate burdens in accordance with their development stage. By distinguishing different levels of development, developed countries create an argument against granting S&D to all the developing countries evenly. On the other hand, the developing countries insist on rebalancing trade rules in a development-friendly way for ensuring real benefits under the WTO system. This has led to demand a number of S&D measures. Practically, developing countries require flexibility to enforce the WTO agreements. They also have requested technological assistance and capacity building which resulted in the 'Aid for Trade' initiative. Regarding a graduation standard for the GSP, there is a sharp difference between

[4] UNCTAD recommended that 'developing countries should reject any attempts to open up the issue of definition of developing country status or list, and preserve the established practice of "self-declaration" in WTO based on prevailing practices and precedents' (UNCTAD 2003a: 2).

developed and developing countries. The developed countries apply a graduation standard based on their own policies, and the developing countries consider this to be arbitrary. The criteria for graduation from the category of 'developing country' have to be objective and transparent.

The situation of opposing views has been complicated also by diversification of developing countries. S&D has been based on grounds where the WTO member countries are divided into two groups: developed countries and developing countries. However, under the present circumstances in which various levels of developing countries exist, there are limitations on the applicability of the traditional S&D system in the real world.

2-(2) Legal Instability of Preferential Schemes

Among S&D measures in the WTO, granting preferential tariffs, represented by the GSP scheme, is the most substantial and effective. In the current world trading system, there are some non-generalized and non-reciprocal preferential arrangements between developing and developed countries. Such arrangements are not regional trade agreement (RTAs) categorized in Article XXIV, nor are they generalized preferential schemes justified by the Enabling Clause. A representative example is the African Growth and Opportunity Act (AGOA), the US law that offers unilateral preferences to African countries.[5] In addition, the Cotonou Agreement, a successor to the Lomé Convention and a predecessor of regional economic partnership agreements (EPAs) between the EU member states and the ACP countries, was another example. The objective of both the AGOA and Cotonou Agreement is to support development of developing countries; they are both generally considered positive and have contributed to achieving such a goal. However, several issues of concern have arisen.

Problems of the AGOA

Through the AGOA, the United States unilaterally provides preferential trade and tax benefits, including duty-free access to the US market to eligible countries. In terms of WTO compatibility, however, the AGOA faces problems because beneficiaries have been chosen in a limited manner. The criteria for eligibility under the AGOA are divided into two stages: *geographical* criteria, i.e., forty-eight sub-Saharan African countries and the pre-determined *social and economic* criteria. To be eligible, a country must have

[5] There are US regional preference schemes other than the AGOA: (i) the Caribbean Basin Economic Recovery Act (CBERA), commonly referred to as the Caribbean Basin Initiative (CBI) and (ii) the Andean Trade Preference Act (ATPA).

established, or be making continual progress toward establishing, the following: a market-based economy, rule of law, economic policies to reduce poverty, protection of internationally recognized worker rights, and efforts to combat corruption.[6] Additionally, a country is examined to see whether it adopts policies that do not interfere with US national security or foreign policy, do not violate internationally-recognized human rights, do not support international terrorism, and eliminate the worst forms of child labour (USTR 2003: 9).

The AGOA can be recognized as a non-reciprocal and geographically-based preferential trade arrangement, which needs a WTO waiver. The United States sought a WTO waiver for its obligations under Article I and successfully received it in 2009. However, renewal of the waiver would face much difficulty owing to the deep-rooted criticism against preferential trade arrangements from WTO member countries who had been excluded.[7]

It is more problematic that the United States, a preference-giving country, can easily revise the AGOA scheme. Because the AGOA as well as other US regional preferential schemes was enacted under federal US law, the United States has the discretion to amend and even terminate the schemes. In addition, under the AGOA, the US president is to determine annually whether sub-Saharan African countries are eligible for AGOA benefits based on the *social and economic* criteria mentioned above. Some countries were newly designated as eligible countries. However, some were removed from the list of eligible countries.[8] Most countries involved in the AGOA understand that there is much ambiguity surrounding eligibility.

Problems of EU Schemes to ACP Countries

The Lomé Convention was designed on the basis of the EC's aid policy for the ACP countries (former colonies of some EC member states). The last agreement under this name (Lomé IV) expired at the end of February 2000 and was replaced by the Cotonou Agreement signed on June 23, 2000.[9] The main objective behind the Lomé Convention

[6] See USTR homepage (http://www.ustr.gov/trade-topics/trade-development/preference-programs/african-growth-and-opportunity-act-agoa).

[7] Under Article XXV of the GATT, a waiver requires approval by a two-thirds majority of the votes cast and one-half of the contracting parties.

[8] For example, the Democratic Republic of Congo were designated as the AGOA eligible country on January 1, 2003, however it lost its eligibility on January 1, 2011. In 2004, the Central African Republic and Eritrea were removed from the list of eligible countries. Mauritania lost eligibility in 2006 and got it again in 2010. In 2010, on the other hand, Guinea, Madagascar and Niger are removed from the list.

[9] The official name of this agreement is *Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and Its*

was not to form a free trade area in terms of Article XXIV but to lay the legal foundation for a development assistance scheme from the EC to the ACP countries. Therefore, the Lomé Convention set up a preferential and non-reciprocal trading system favouring the ACP countries by allowing them almost free access to EC markets for nearly all industrial goods and for a wide range of agricultural products. Moreover, regarding banana imports for example, the EC granted preferential trade arrangements to ACP countries by imposing no duties and introducing a preferential quota only for ACP countries. However, these preferences were determined to be a violation of MFN obligations in GATT/WTO dispute settlement cases.

The Cotonou Agreement was also incompatible with WTO rules, because it inherited the feature of non-reciprocal preference from the Lomé Convention. In order to avoid a recurrence of the same disputes that had plagued the Lomé Convention, participants in the Cotonou Agreement obtained a seven-year waiver from WTO rules at the Doha Ministerial Conference in November 2001. At the same time, the EU proposed to replace the preferential trade provisions in the Cotonou Agreement with reciprocal EPAs in order to meet the requirements of Article XXIV.[10] Because the EU wanted WTO consistency of the Cotonou Agreement, newly concluded EPAs or interim agreements lost the preferential nature.

3. Alternative Approaches to S&D

3-(1) Differentiation among Developing Countries

Recently various new approaches to S&D have been suggested by academics and other researchers (Michalopoulos 2000, Stevens 2002, Hoekman et al. 2003, Keck and Low 2004). Many of them have recommended differentiation among developing countries. However, differentiation among developing countries has not yet been put into practice. In order to make S&D more operational, it should be re-emphasized that, differentiation among developing countries is necessary. There is a similar notion regarding S&D in the field of international environmental law called the ‘common but differentiated responsibility’ (CBDR) principle. Is it possible to apply this CBDR principle to S&D by analogy?

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[10] Because of the difficulties involved in concluding one broad EPA among all the countries concerned, the new scheme divides the ACP countries into seven groups by region, with EPAs or interim agreements concluded between the EU and each of these groups.

Overview of the CBDR Concept

The principle of CBDR contains a dual concept. The first concerns the common responsibility of states for the protection of the environment at the national, regional and global levels. The second concerns the differentiated contributions to reducing environmental harm based on criteria such as a particular state's historical contribution to environmental damage and its capacity to prevent, reduce and control further environmental damage. As a result, the CBDR allows different, in general fewer, obligations to be placed on developing countries. Contrasting with this notion of 'formal equality,' CBDR aims to promote 'substantive equality' between developing and developed countries. Differentiated allocation of responsibility appears in various international legal instruments. Among them, the Rio Declaration at the United Nations Conference on Environment and Development (UNCED) in 1992 has particular importance. Principle 7 of the Declaration, even though Principle 6 is also relevant to the concept of CBDR, specifies CBDR as follows:

> '[i]n view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.'

As to the term of CBDR, it explicitly appears in the UNFCCC. Article 3(1) of the UNFCCC provides that '[t]he parties should protect the climate system … on the basis of equality and in accordance with their *common but differentiated responsibilities* and respective capabilities' (italicized by author). Based on this provision, the Convention requires specific commitments only for developed country parties, and allows differentiation in reporting requirements. The other forms in international instruments reflecting the notion of differentiation are setting differential standards, permitting grace periods in implementation, requiring flexibility (less stringent commitments), and the provision of international assistance (Yu 2002, French 2000: 39). The grace period, or the form of delayed compliance timetables, is a popular type of differentiation.

Differential treatment in favour of developing countries is a key element of both the CBDR and S&D principles. However, the attitude toward differentiation among developing countries is completely different. Under the CBDR principle, the responsibility of each state to address global environmental problems can differ due to different social, economic and ecological situations. It is theoretically possible for every

country to have different extents of responsibility. Not only differentiation between developed and developing countries but also differentiation among developing countries is specified in some multilateral environmental agreements (MEAs). For example, under the UNFCCC, non-Annex I parties were categorized according to the criteria mentioned in the Convention, and some new groups were identified, such as Newly Industrialized Countries (NICs) and Rapidly Industrializing Developing Countries (RIDCs). Altogether, non-Annex I countries were differentiated into four groups, each including countries with similar national circumstances. Similarly, the Desertification Convention (1997) requires that '[p]arties … give priority to *affected African country parties*, in the light of the particular situation prevailing in that region, while not neglecting affected developing country parties in other regions' (italicized by author).

On the other hand, the traditional approach toward development issues in the WTO still emphasizes that developing countries need appropriate strategies as a package rather than strategies that focus on sectoral and divisive programs. Even if differentiation among developing countries is necessary, the preferences are to be accorded not because of political, cultural or even geographical ties, but because of the difference in the levels of economic development (Yusuf 1980: 488, 492).

Applicability of CBDR Principle to WTO Trade Negotiations

The principle of CBDR has become a normative standard in the development of international environmental law. It requires that international environmental governance must take into account the specific needs and interests of developing countries. On the other hand, the principle of S&D allows a certain degree of discrimination in favour of developing countries in the WTO system. This discrimination inevitably violates the MFN obligation, which is the fundamental principle of the WTO. However, it is justified by the notion that the needs of developing countries are substantially different from those of developed countries.

Until now, these two principles have functioned in their respective relevant fields of international law, e.g., international environmental law and international trade law. In recent interpretations of WTO law, however, there is movement towards an obligation to consider the particular economic, social and environmental situation of developing countries, especially when adopting environmental measures. The WTO dispute settlement panel in the *Shrimp* case expressly mentioned the principle of CBDR in its conclusions. Based on the second sub-paragraph of Paragraph 32 of the WTO Doha Ministerial Declaration, negotiations on trade and environment in the WTO must take account of the needs and interests of developing countries and LDCs. In order to ensure that the outcomes of these negotiations take into account the needs and interests of

developing countries and LDCs, both CBDR and S&D principles must be applicable and operational in the negotiations. Moreover, because of the similarity of these two principles, they can be regarded as complementary principles.

Deficiencies: Fragmentation of Legal System

Introducing differentiation among developing countries to the field of international trade law might promote segmentalization in the WTO framework. Both CBDR and S&D principles endeavour to promote substantive equality between developing and developed countries within their respective regimes, rather than mere formal equality. The aim of the principles is to ensure that developing countries can come into compliance with particular legal rules over time, which leads to strengthen the regime in the long term. Practically speaking, however, differential responsibility or differential treatment does result in different legal obligations. In this sense, the principles of CBDR and S&D are not consistent with the principle of sovereign equality under traditional international law.

Within the WTO legal system, S&D contains two different components: preferential access to foreign markets granted to developing countries and a right to protect domestic markets. The latter, for example, permits developing countries to mitigate commitments under the WTO agreements by taking a longer time-frame than that of developed countries. In addition, S&D refers to reduced levels of reduction commitments, and other mechanisms that essentially seek to provide developing countries with some limited flexibility to cope with the economic pressures of trade liberalization and a right to protect domestic markets. Currently, developing countries are facing major problems from having to fulfil their own obligations in the numerous WTO agreements. The S&D principle can promote integration of countries within the world trading system at their own pace and therefore support the basic objective of the WTO. The CBDR principle, on the other hand, provides for asymmetrical rights and obligations regarding environmental standards, aiming to induce broad state acceptance of treaty obligations.

Thus, CBDR and S&D can play an important role as kinds of ‘reservations’ to treaties which encourages developing countries to join into a relevant treaty regime. The Vienna Convention of the Law of Treaties (1969) stipulates that a reservation is a declaration made by a state by which it purports to exclude or alter the legal effect of certain provisions of a treaty in their application to that state.[11] Reservations enable a state to participate in a treaty in which it would not be able to participate due to an

[11] Relevant articles are Article 2 (1) (d) and Articles 19-23.

unacceptable provision or provisions. It is desirable to make states parties to treaties even with reservations than for states not to be parties to such treaties at all. This is the reason why a reservation mechanism has been introduced into the international treaty regime.

However, if the CBDR and S&D principles could function the same as reservations to treaties, they might weaken the regime on which they are based. It would be a form of fragmentation. CBDR and S&D are merely normative guidelines; they do not have any detailed rules to operate efficiently. In other words, there is discretionary margin for determining the extent to which each state should take responsibility. In contrast, international law provides precise rules on reservations, including what reservations are, who can formulate reservations, when reservations can be formulated, the form of reservations, prohibited reservations, and how and who can object to reservations. For example, reservations must not be incompatible with the object and the purpose of the treaty. Furthermore, a treaty might prohibit reservations or only allow certain reservations to be made. In many cases, the purpose of the reservation is to adjust the reserving state's obligations under the treaty to conform to its domestic law where it is not feasible or desirable to change the law. When states formulate a reservation to a treaty, they must comply with such rules on reservations. In order for CBDR and S&D to operate as reservations, clear and detailed rules are necessary.

3-(2) Codification of a Preferential Scheme as a Multilateral Agreement

As mentioned in 2-(2), a preferential scheme for specific developing countries such as the AGOA or Cotonou Agreement is legally unstable for developing countries in two senses: (1) it cannot survive under the WTO without a waiver and (2) if the scheme is operated on the basis of national law, it can be changed at the discretion of a preference-giving country. In order to strengthening its legal stability, a preferential scheme, at least one granting preferences only to LDCs, should be concluded as a North-South regional trade agreement that applies S&D. By doing this, preference-receiving countries can claim to receive preferences as treaty rights, and preference-giving countries can set clear criteria for graduation.

Possible Options for Gaining Compatibility with WTO Rules

The essential characteristics of North-South preferential schemes, which provide benefits to limited groups of developing countries, are their non-generalized and non-reciprocal features. The former feature excludes such North-South preferential schemes from the coverage of the Enabling Clause. On the other hand, due to the

second feature, North-South preferential schemes cannot fulfill the criteria of RTAs as stipulated in Article XXIV of the GATT. In view of the current legal system of the WTO, specific trade preferences for limited groups of developing countries are inevitably incompatible with WTO rules. Therefore, North-South preferential schemes inevitably come into conflict with Article I. There are three possible ways for states to justify their preferential schemes as deviations from MFN treatment: (a) by obtaining a WTO waiver pursuant to Article IX of the WTO Agreement, (b) by extending specific preferences to all developing countries and (c) by creating regional trade agreements, as specified in Article XXIV of the General Agreement.

In the past, countries have maintained these specific preferences usually by obtaining waivers. However, gaining a waiver under the WTO has lately become a more difficult process. This is partly because in 1995 the reform of the GATT into a new institution, the WTO, brought about the enhancement and expansion of the 'rule of law.' As a result, there was an increasing belief that exceptions which could erode the legal system had to be restrained to a minimum. Even if the WTO grants waivers for North-South preferential schemes, the waiver period is now shorter than most cases in the past. Those preferential schemes that have not yet received waivers are likely to be examined by the Dispute Settlement Body (DSB) for their consistency with WTO rules when a case is brought before the DSB.[12]

The second option for attaining WTO compatibility for preferential trade schemes has become of little effect. In order to assimilate geographically-limited preferences into GSP schemes, some preference-giving countries have attempted to generalize these schemes. The Cotonou Agreement and the AGOA scheme are often cited as prominent examples (FAO 2003, Hoekman et al. 2003). However, both sides to geographically-limited preferences schemes share negative views about the extension of limited preferences to all developing countries. Developing countries might lose existing preferences. On the other hand, developed countries might lose their strategic measures for assisting specific groups of developing countries.

In these circumstances, countries in recent years have actively attempted to substitute specific preferences with free trade areas, which are officially permitted in the WTO system. The EU's policy to replace the Cotonou Agreement by seven EPAs is a good example. Interestingly, the AGOA also contemplates the future negotiation of an FTA between the United States and AGOA beneficiaries, but as yet no action toward

[12] For instance, India called for the establishment of a panel under the DSU that would examine the EU's special tariff preferences to the so-called Drug Arrangements, under which only twelve developing countries could benefit. The WTO issued a panel report on December 1, 2003, and found the EU's arrangement to be in violation of trade rules because it discriminated against other developing countries.

negotiations on such an agreement has started (Washington Trade Report 1999, IPC 2003). However, by replacing non-generalized preferential schemes to reciprocal North-South RTAs, such schemes would lose their importance of existence, or "preferential feature."

Flexibility in North-South RTAs

North-South trade arrangements would be approved as RTAs only if all participants reciprocally liberalized their trade practices. However, it is difficult to apply symmetrical obligations, such as tariff elimination, among participants which are unequal in terms of economic strength. Thus, developing countries, in particular ACP countries, often request limitations to the degree of reciprocity in RTAs or seek techniques to avoid granting full reciprocity. As Onguglo and Ito (2003: 1) point out, 'there exists a legal lacuna in terms of availability of S&D' in respect to North-South RTAs. The concept of flexibility is legally based on the term 'exceptional cases' in the Understanding on the Interpretation of Article XXIV. Paragraph 3 of the Understanding states that '[t]he "reasonable length of time" referred to in paragraph 5(c) of Article XXIV should exceed 10 years *only in exceptional cases*' (author's italics). In Article V paragraph 3 of the GATS, moreover, the term 'flexibility' for developing countries is explicitly mentioned:

> Where developing countries are parties to an agreement of the type referred to in paragraph 1, flexibility shall be provided for regarding the conditions set out in paragraph 1, particularly with reference to subparagraph (b) [this means the condition 'a reasonable length of time'] thereof, in accordance with the level of development of the countries concerned both overall and in individual sectors and subsectors.

The GATS, however, does not characterize the available flexibility. Consequently, while the S&D for developing countries is recognized in RTAs on services, its practical usage remains unspecific.

Judging by the precedents, flexibility applies mostly in two spheres: in the transition period and in the product coverage. The former allows deviations under the 'reasonable length of time' condition, while the latter allows deviations under the 'substantially all the trade' condition. The view of the WTO's Committee on Regional Trade Agreements (CRTA), however, is that the concept of flexibility applies only in the transition period and that the issue of product coverage is outside the scope of

flexibility. In accordance with this view, not a few cases of RTAs have persuaded a longer time frame than ten years as a transitional period without a waiver. On the contrary, even though the flexibility in product coverage constitutes de facto acceptance of S&D, no legal guarantee is given in respect to the compliance of these provisions with WTO rules. There is much skepticism regarding flexibility in product coverage as neglect of the Article XXIV requirement.

Concluding Remarks

S&D system in the WTO is at a crossroad. When it was devised for allowing preferential treatments such as GSPs, S&D contributed for developing countries to participate substantially and positively in the multilateral trading system. Under the current DDA negotiation, however, it is a crucial issue in two sences; whether developing countries will attach importance to the WTO as an organization promoting their development and whether developed countries will regard the WTO necessary to ensure stable, transparent and predictable trading system. Serious discussion on reforming S&D has to be initiated before member countries lose their interests in the multilateral trading system.

This paper described two directions in which the S&D debate might proceed with more promising prospects for agreement among members. One is differentiation among developing countries, applying the CBDR principle by analogy. The other is codification of a preferential scheme as a multilateral agreement, precisely speaking, in the manner of North-South RTAs with flexibility. Both alternatives have pros and cons. However, in order to break through the impasse which the Doha negotiation is now facing, there is a need to raise questions about the current system and to create momentum for discussing the issues positively.

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