Special and Differential Treatment of Developing Countries within the Legal Framework of the WTO

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The Benefits of Trade to Developing Countries

- Generally accepted that trade is an engine of economic growth and development
- Developing countries determined to play a greater role in the MTS – G20, G33, NAMA 11 etc
- Potential benefits from the liberalization of trade far exceeds current levels of ODA provided to developing countries by OECD countries
- Developing countries focusing on barriers maintained by developed countries in order to increase their exports and diversify their economies
The Benefits of Trade to Developing Countries

- Among the concerns of developing countries are the subsidies provided by developed countries to various producer groups in their countries, particularly in the agricultural sector.
- They are also targeting tariff peaks and tariff escalation as well as non-tariff barriers, particularly anti-dumping and countervailing measures, technical barriers to trade and sanitary and phytosanitary measures.
- Developing countries also complain about the rigidity of some WTO Agreements which hamper their efforts to attract investment in certain critical areas of their economies, e.g., the TRIMS Agreement and the SCM Agreement.
The Benefits of Trade to Developing Countries

- The link between trade and growth and development is fiercely debated by economists. Some of the view that the link is tenuous and that there is no established link between the two.

- The better view seems to be that trade is actually beneficial to developing countries. However, they need to adopt the appropriate domestic policies in order to benefit from the multilateral trading system. Mere membership of the WTO is not enough.

- A favourable external environment can help, but there is the need for realism. Developed countries need to respond positively to the concerns of developing countries during this round of negotiations.
The Benefits of Trade to Developing Countries

- Millennium Development Goals
- DDA – development at the core of the negotiations
- Aid for Trade
- Technical cooperation and capacity building – enhanced integrated framework, JITAP, SDTF etc
- Bilateral assistance offered by donor countries to strengthen the trade capacity of developing countries
GATT & Developing Countries

- Brief history of the multilateral trading system
- The Havana Charter - The General Agreement on Tariffs and Trade
- Twenty-three contracting parties to the GATT, out of which 11 were developing countries (Brazil, Burma (Myanmar), China, Ceylon (Sri Lanka), Chile, Cuba, India, Lebanon, Pakistan, Southern Rhodesia (Zimbabwe) and Syria. South Africa signed as a developed country.
GATT & Developing Countries

- The MFN principle – limited exceptions
- Developing countries participated as equal partners in tariff negotiations and had to justify the introduction of restrictive measures
- Why did the GATT not contain elaborate S&dt provisions?
- Could probably be the high level of tariffs at that time
- Flexibility in the rules covering agriculture
As the number of developing countries increased, discontent about the GATT also increased. Basic philosophy of the GATT challenged by developing countries. Cannot talk about a level playing field when countries at very different levels of development. Unequal level justified the extension of SDT to them.
Special & differential treatment

- At the GATT Review Session in 1955, agreement that developing countries should be granted S&dt.
- Before examining the measures which were passed, necessary to define what S&dt is.
- Basically they are measures designed to facilitate the integration of developing countries into the multilateral trading system. Could be classified under two main headings:
Special & differential treatment

- measures allowing developing countries the flexibility to adopt restrictive measures to promote their economic development; and
- measures which encourage developed countries or advanced developing countries to grant preferential treatment to the exports of developing countries, particularly least-developed countries.
Special & differential treatment

- Progressive Consideration of the Specific Needs of Developing Countries
  - First Measure was the revision of Article XVIII in 1955 to permit developing countries to adopt, *inter alia*, measures to safeguard their balance-of-payments problems and also to promote the establishment of a particular industry
Scope of Article XVIII of the GATT 1994

Paragraph 4(a) “provides that a [Member whose] economy ... can only support low standards of living* and is in the early stages of development* shall be free to deviate temporarily from the provisions of the other Articles of this Agreement, as provided in Sections A, B and C of this Article”.
Special & differential treatment

- Scope of Article XVIII of the GATT 1994
  - According to the Interpretative Notes the following should be taken into account when interpreting paragraph 4 of Article XVIII:
    - “Can only support low standards of living”
    - Normal position of the Member’s economy
    - Consideration should not be given to exceptional circumstances such as those that might result from the “temporary existence of exceptionally favourable conditions for the staple export product or products of that [Member]”. 

Special & differential treatment

- Scope of Article XVIII of the GATT 1994
  - “In the early stages of development” applies to the following countries
    - Countries which have just started their economic development
    - Countries whose economies are undergoing the process of industrialisation to correct an excessive dependence on primary production
Special & differential treatment

- Scope of Article XVIII of the GATT 1994
  - “Paragraph 4(b) provides that a [Member whose] economy … is in the process of development, but which does not come within the scope of subparagraph (a) above, may … [have recourse to] Section D of this Article”.
Special & differential treatment

- Paragraph 4(a) vrs Paragraph 4(b)
  - Members which come within the scope of paragraph 4(a) can have a lot of room to manoeuvre, whereas under paragraph 4(b), their options are restricted
  - Members falling under paragraph 4(a) can invoke Sections A, B and C of Article XVIII, whereas those falling under paragraph 4(b) may legally invoke only Section D of Article XVIII.
Special & differential treatment

- Paragraph 4(a) vrs Paragraph 4(b)
  - The issue was considered in the case on Malaysia - Prohibition of Imports of Polyethylene and Polypropylene from Singapore (WT/DS1).
  - Malaysia argued that as a developing country, it was entitled to invoke Article XVIII:C of the GATT 1994
  - The United States expressed the view that Malaysia was not a country in the early stages of development, and as such was only entitled to invoke Section D of Article XVIII
The parties settled the case on 19 July 1995, with Singapore withdrawing its panel request. The case was interesting not only because it was the first case to be brought under the DSU, but also it was between two developing countries who are ASEAN members. It was also the first time that the right of a developing country to have recourse to Article XVIII: C had been contested by a developed-country Member of the WTO.
Special & differential treatment

- **Article XVIII: A of the GATT 1994**
  - Requirement that the developing-country Member comes within the scope of paragraph 4(a)
  - It must be its objective to promote the establishment of a particular industry* with a view to raising the living standards of its people
  - According to the Interpretative Notes, particular industry refers not only to a new industry, but also the upgrading and transformation of an existing industry
Special & differential treatment

- Article XVIII: A of the GATT 1994
  - If conditions satisfied, it could enter into negotiations with countries possessing INRs and those with a substantial interest to modify or withdraw a concession in its Schedule of Concessions
  - If agreement is reached, then developing-country Member could withdraw concessions and give compensation to the affected Members
  - If no agreement, could still withdraw the concession, but the affected Members could suspend equivalent concessions
Special & differential treatment

- **Article XVIII: B of the GATT 1994**
  - Recognition that countries in the early stages of development tend to experience BOPs difficulties arising mainly from efforts to expand internal markets as well as from the instability in their terms of trade.
  - To safeguard their external financial position and to ensure reserves adequate for the implementation of their economic programmes, such Members could restrict the quantity or value of merchandise permitted to be imported; *provided that the import restrictions instituted, maintained or intensified shall not exceed those necessary:*
Special & differential treatment

Article XVIII: B of the GATT 1994

- To forestall the threat of, or to stop, a serious decline in its monetary reserves, or
- in the case of a [Member] with inadequate monetary reserves, to achieve a reasonable rate of increase in its reserves (see Art XVIII:9)
- COMPARE WITH ARTICLE XII
- To forestall the [IMMINENT] threat of, or to stop, a serious decline in its monetary reserves, or
- in the case of a [Member] with ---VERY LOW monetary reserves, to achieve a reasonable rate of increase in its reserves
Special & differential treatment

- Article XVIII: B of the GATT 1994
  - Due regard to be had to special factors which have a bearing on the country’s reserves, including special external credits etc.
  - Priority could be given products which are of importance to the Member’s economic development programme. In so doing, however, Members are to avoid unnecessary damage to the commercial or economic interests of any other Member.
  - Minimum commercial quantities of a product to be allowed, if exclusion could impair regular channels of trade.
  - Importation of commercial samples to be allowed. Restrictions should prevent compliance with intellectual property rights.
Special & differential treatment

- Article XVIII: B of the GATT 1994
  - Conditions to be observed by developing-country Members - para. 11:
    - Essential for Member to restore equilibrium in its BOP on a sound and lasting economic basis
    - Progressively relax any restrictions as conditions improve, maintaining them only to the extent necessary …and shall eliminate them when conditions no longer justify such maintenance
    - Provided that no Member shall be required to withdraw or modify restrictions on the ground that a change in its development policy would render unnecessary the restrictions which it is applying under this Section (see interpretative note)
Special & differential treatment

- Article XVIII: B of the GATT 1994
  - Conditions to be observed by developing-country Members - para. 11:
    - According to the Interpretative Notes, the above provision shall not be interpreted to mean that a Member is required to relax or remove restrictions if such relaxation or removal would thereupon produce conditions justifying the intensification or institution, respectively under paragraph 9 of Article XVIII.

- In *India - BOPs*, it was held that the words in italics require a causal link of a certain directness between the removal of the BOP restrictions and the recurrence of one of the three conditions referred to in Article XVIII:9.
Special & differential treatment

- **Article XVIII: B of the GATT 1994**
  - Conditions to be observed by developing-country Members - para. 11:
  - The Appellate Body agreed with the Panel that the word “thereupon” expresses “a *notion of temporal sequence* between the removal of the BOP restrictions and the recurrence of one of the conditions of Article XVIII:9. ... The purpose of the word “thereupon” is to ensure that measures are not maintained because of some distant possibility that a BOP difficulty may occur”.
Special & differential treatment

- Article XVIII: C of the GATT 1994
  - Requirement that the developing-country Member comes within the scope of paragraph 4(a)
  - Necessary to show that governmental assistance is required to promote the establishment of a particular industry* with a view to raising the living standards of its people
  - Notification of special difficulties being encountered to achieve this objective and the specific measures the Member intends to take to remedy the situation
  - Efforts should be made to get the concurrence of Members before the introduction of the restrictive measures
Special & differential treatment

- Article XVIII: C of the GATT 1994
  - Under certain circumstances, measures could be introduced before consultations with Members
  - Where agreement could not be reached and the measure affects a product in respect of which a concession has been given, possibility of the affected Member to suspend equivalent concessions
  - Recourse to Article XVIII:C very frequent in the early days of the GATT, but hardly resorted after the entry into force of the WTO Agreement
Special & differential treatment

- Article XVIII: D of the GATT 1994
  - Requirement that the developing-country Member comes within the scope of paragraph 4(b)
  - Necessary to show that governmental assistance is required to promote the establishment of a particular industry* with a view to raising the living standards of its people
  - Consultations should take place before the introduction of the restrictive measures
  - If agreement reached, Member could introduce the measures
Special & differential treatment

- Progressive Consideration of the Specific Needs of Developing Countries
- Second measure to be introduced at the 1955 Review Session was Article XXVIIIbis. Paragraph 3(b) provides that
  - “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”.
Special & differential treatment

- Progressive Consideration of the Specific Needs of Developing Countries
  - Resolution on particular difficulties connected with trade in primary commodities was adopted in November 1956.
  - A number of initiatives adopted between 1957 and 1964. There was the expert panel headed by Prof. Gottfried Harberler, which concluded that “there was 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”.

Special & differential treatment

Progressive Consideration of the Specific Needs of Developing Countries

- Declaration adopted in November 1960 implementing the provisions of Article XVI:4 of the GATT. Developing countries effectively exempted from the obligation not to provide export subsidies to manufactured products.

- Declaration passed in December 1961 aimed at promoting the trade of developing countries. CPs encouraged, *inter alia*, to abolish tariffs, QRs and tariff escalation on products of export interest to developing countries.
Progressive Consideration of the Specific Needs of Developing Countries

While a number of initiatives had been adopted, it was realised that there was no proper legal framework.

At a ministerial meeting in May 1963, it was recommended that there was the “need for an adequate legal and institutional framework to enable the CONTRACTING PARTIES (CPs) to discharge their responsibilities in connection with the work of expanding the trade of less-developed countries.” Principle of non-reciprocity mentioned.
Special & differential treatment

- Progressive Consideration of the Specific Needs of Developing Countries
  - The result was the authorisation for the Committee on Legal and Institutional Framework of GATT in relation to Less-Developed Countries to draft a chapter on Trade and Development to be incorporated into the GATT.
Special & differential treatment

- Progressive Consideration of the Specific Needs of Developing Countries
  - The chapter was finalised in a Special Session of the CPs held from November 1964 to February 1965. It formally came into effect on 27 June 1966.
  - The adoption of Part IV was seen as a milestone in the history of international trade relations. There was the expectation that it would facilitate the greater participation of developing countries in the multilateral trading system and lead to economic growth and development.
Progressive Consideration of the Specific Needs of Developing Countries

The expectations of developing countries were dashed, as developed countries interpreted the provisions of Part IV as not imposing legal obligations on them. They considered them as best endeavour clauses. Developing countries took a contrary view and questioned that if they were not meant to have legal force, why insert them into the GATT
Special & differential treatment

- Scope of Part IV of the GATT
- Part IV contained three new articles, namely Articles XXXVI, XXXVII and XXXVIII.
  - **Article XXXVI**, entitled principles and objectives, contained a number of important provisions:
    - It was recognised that there was the need to increase market access for products of export interest (current and potential) to developing countries
Special & differential treatment

- Scope of Part IV of the GATT
  - *The principle of non-reciprocity* in trade negotiations was formally recognised: “The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties.”
  - Concept clarified in an interpretative note and also during the Kennedy Round.
Special & differential treatment

- **Scope of Part IV of the GATT**
- **Significance of the non-reciprocity principle for developing countries**
  - Meant that developing countries could maintain high tariffs and a host of non tariff barriers. Under no obligation to participate in negotiations let alone give concessions.
  - Permitted developing countries to pursue import substitution policies to establish and nurture infant industries.
  - Was the adoption of the non-reciprocity clause a mistake?
Special & differential treatment

- Scope of Part IV of the GATT

- Article XXXVII, entitled commitments, obliged developed countries to undertake certain actions in favour of developing countries’ trade.

  - Developed countries were required, “to the fullest extent possible” to accord high priority to the reduction and elimination of barriers differentiating unreasonably between primary and processed products and to maintain a standstill on other barriers to actual or potential exports from developing countries.
Special & differential treatment

- Scope of Part IV of the GATT
  - In applying contingency protection measures, developed countries were obliged “to explore all possibilities of constructive remedies before applying such measures”.
  - Do you think the provisions are enforceable?
Special & differential treatment

- Scope of Part IV of the GATT
- **Article XXXVIII**, entitled joint action, required the CPs to take action, *inter alia*, through international agreements to improve access to worlds markets for primary products of interest to developing countries, and to devise measures for stabilizing and improving the conditions of world markets for such products.
Special & differential treatment

- Scope of Part IV of the GATT
- Co-operation with the UN and other international organisations to further the trade objectives of developing countries in the multilateral trading system. CTD and the ITC established in 1964.
- Was Part IV worth it from the viewpoint of developing countries?
Special & differential treatment

  - Special procedures for settling disputes in which developing countries were involved - April 1966
  - The CPs adopted in 1966 a report of the CTD, which recognised that trade between developing countries could be beneficial in terms of facilitating their integration into the MTS. In 1968, India, Egypt and Yugoslavia implemented a PTA called Trade Expansion and Economic Cooperation Agreement.
  - UNCTAD - GSP - Waiver
  - Simplified consultation procedures for Developing countries invoking the BOP - 1972
Special & differential treatment

- The Enabling Clause adopted in 1979 as part of the results of the Tokyo Round. Provided permanent legal bases for the ff:
  - Derogation from the MFN principle to allow developed countries to grant trade preferences on a non-discriminatory basis to developing Countries (Generalized System of Preferences - GSP).
  - Are current schemes non-discriminatory?
  - Graduation of successful developing countries by developed countries
  - Disqualifying countries which do not meet certain standards e.g., the protection of intellectual property rights
Special & differential treatment

- Derogation from the MFN principle to permit developing countries to enter into regional trade agreements among themselves.

- Does the Enabling Clause provide an alternative legal basis for the formation of RTAs?

- MERCOSUR - Precedent or a special case?

- Derogation from the MFN principle to permit deeper preferences to be extended to least-developed countries within GSP schemes

- Other measures adopted in favour of developing countries: BOP measures, relaxation of conditions under Article XVIII; tariff preferences on tropical products
Special & differential treatment

- Non-reciprocity principle maintained, but an important qualification introduced.
- In the Subsidies Code, it was recognised that subsidies could play an important role in the economic development of developing countries. However, developing countries were required to enter into negotiations to reduce or eliminate their export subsidies when the use of such subsidies was inconsistent with their competitive and development needs.
- Cf. Article 27 of the UR Agreement on Subsidies and Countervailing Measures. Brazil - Canada Civil Aircraft case.
Special & differential treatment

- Relevance of S&dt to Developing Countries
  - Questions were raised in the 1980’s, first by academics as to whether the grant of S&dt to developing countries has really made any differences in terms of the participation of developing countries in the MTS.
  - Most developing countries had not benefitted from it. The share of ACP countries in the European Union market had declined by more than 50% notwithstanding extensive preferences granted to them under the Lomé Convention. From around 7% to less than 4%.
Special & differential treatment

- Relevance of S&dt to Developing Countries
  - View expressed that the grant of S&dt made it possible for developed countries to maintain barriers in sectors of export interest to developing countries, namely agriculture, textiles and clothing and the abuse of WTO disciplines on safeguard measures thorough the imposition of grey-area measures such as VERs, OMAs.
Special & differential treatment

- Relevance of S&dt to Developing Countries
  - During the Uruguay Round, the concept of S&dt was diluted. The implications of the single undertaking approach
  - For the first time, developing countries were able to forcefully demand a reduction of the barriers facing products of export interest to them.
Special & differential treatment

- S&dt After the Uruguay Round - They could be grouped under 5 main headings:
  - Increased trading opportunities for developing countries;
  - Due restraint to be applied when implementing defensive measures (to take into account the specific needs of Developing countries);
  - Flexibility granted to developing countries in their use of trade policy instruments;
  - Longer transitional periods with a view to assisting developing countries to implement WTO obligations;
  - Strengthening the technical assistance programme of the WTO
Special & differential treatment

- Provisions aimed at increasing trade opportunities of developing countries. According to the WTO Secretariat, there are twelve of such provisions in the UR Agreements including the GATT 1994.

- These provisions basically encourage the developed countries to adopt positive measures which would result in increased trade opportunities for developing countries.

- An example is Article XXXVII of the GATT 1994, which relevantly provides:
Special & differential treatment

- “…the developed … [Members] shall to the fullest extent possible … accord high priority to the reduction and elimination of barriers to products currently or potentially of particular export interest to … [developing countries].”
- Is this provision enforceable?
  - Could not it be argued that by using the words “shall to the fullest extent possible” the obligation on developed countries is unequivocal?
  - What about the use of the words accord high priority”? Does not it indicate that the obligation is not absolute?
Special & differential treatment

- Article IV of the GATS relevantly provides that:
  - “[t]he increasing participation of developing country Members in world trade shall be facilitated through negotiated specific commitments...relating to...the strengthening of their domestic services capacity and its efficiency and competitiveness, inter alia, through access to technology on a commercial basis;...the improvement of their access to distribution channels and information networks; and...the liberalization of market access in sectors and modes of supply of export interest to them”. (emphasis added)

- Is this provision enforceable?
  - Probably not. Developed countries have an obligation, however, to enter into negotiations with developing countries which specifically request market access. No guarantee that negotiations would produce any results
Special & differential treatment

- **CASE LAW: United Kingdom - Dollar Area Quotas**: The argument by the United Kingdom that it was maintaining the trade restrictions (QRs) so as to further the trade interests of certain Caribbean countries was not endorsed by the Panel.

- **Norway - Restrictions on Imports of Certain Textile Products**: The argument by Norway that the QRs that it had imposed on HK, China’s exports and the preferential treatment it had accorded the exports of 6 developing countries were justified by Part IV was rejected.

- **EEC - Restrictions on Imports of Dessert Apples from Chile**: There, Chile alleged breaches of Articles XXXVI and XXVII.
CASE LAW (continued)

The Panel expressed the view that the EEC’s import measures has negatively affected the exports interests of a developing country (Chile) and that there was no evidence to indicate that the EEC had adopted appropriate efforts to avoid taking protective measures on apples from Chile.

Decision quite unique and interesting. Panel, however, side-stepped the issue of whether the EEC had breached its obligations under Part IV.
Special & differential treatment

- Measures safeguarding the interests of developing countries
- These require developed country Members of the WTO to take into account the special situation of developing countries before imposing any measures which might affect their trade interests.
- Article 10(1) of the Agreement on Sanitary and Phytosanitary Measures, for example, provides that:
  - "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."
Special & differential treatment

- Is this provision legally enforceable?
- Probably not. There is the obligation on developed country Members to consider the effects that their intended sanitary or phytosanitary measures may have on developing countries, but provision does not compel them to change those measures even if there is the probability that they may negatively impact on the interests of developing countries.
- Developing countries seem to accept that language does not create any enforceable rights, hence the SPS proposal under paragraph 21 of the implementation proposals.
Special & differential treatment

- Article 12.3 of the TBT Agreement provides:
  - “Members shall, in the preparation and application of technical regulations, standards and conformity assessment procedures, take account of the special development, financial and trade needs of developing country Members …”.

- Is it enforceable? Probably not. As stated developed countries are only obliged to consider the probable effects of their measures, but there is no obligation to withdraw them.
Article 15 of the Anti-Dumping Agreement:

“\textit{It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping duties. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.}”

Is this provision legally enforceable?
It would appear that developed country Members have an obligation to consider, for example, accepting price undertakings, instead of imposing antidumping duties. However, it appears that there is no positive obligation on them to accept such alternative remedies. See Cotton Yarn Panel case and EC - Cotton.

In the *EC- Cotton-type Bed Linen case*, India argued that the EC had acted inconsistently with Article 15 of the ADA by not exploring possibilities of a constructive remedy and by not even reacting to arguments from Indian exporters pertaining to Article 15.
With respect to the first sentence, the Panel observed as follows:

- “The key words here are “special regard” and “when considering”. It transpires from the text that the relevant moment when the first sentence comes into play is when there is a determination of dumping and injury caused thereby. The importing country authorities then have to determine whether these findings, as well as any other elements relative to the case, would militate in favour of imposition of anti-dumping measures or not. The first sentence of Article 15 states a preference that the special situation of developing countries should be an element to be weighted when making that evaluation.”
The Panel, however, reached the following conclusion:

- “The first sentence does not seem to create a rock-solid legal obligation. This follows from the opening words “It is recognized that … “ and the wording “special regard must be given”. The first sentence thus contains a statement of preferred policy. This conclusion would seem reinforced by Article 17.6(ii) second sentence, of the ADA”. 
Special & differential treatment

- With respect to the second sentence, the Panel’s views were as follows:
  - “The text and spirit of the second sentence differs considerably from that of the first sentence. To start with, the object of the sentence ("essential interests of developing country Members") would seem to be more direct than the - rather vague - “special situation” of developing country Members mentioned in the first sentence. The obligations in the second sentence are accordingly stricter ... It follows that the second sentence, when regarded in the context of the Agreement, lays down clear obligations. First, there must ipso facto be a determination (or assessment) whether the essential interests of the developing country concerned may be involved. This determination must have been made “before applying anti-dumping duties”
With respect to the second sentence, the Panel held as follows:

“...Then the investigating authorities are required to explore possibilities of constructive remedies “provided for by this Agreement”. These last words would seem to indicate that the remedy may consist of, among others, the non-imposition of anti-dumping measures, or an undertaking. As to the timing of the “exploration of possibilities of constructive remedies”, these “shall” be explored “before applying anti-dumping duties”. In the EC context, this means before provisional anti-dumping duties are imposed”.

With respect to the second sentence, the Panel held as follows:

“…In our view, Article 15 imposes no obligation to actually provide or accept any constructive remedy that may be identified and/or offered. It does, however, impose an obligation to actively consider, with an open mind, the possibility of such a remedy prior to imposition of an anti-dumping measure that would affect the essential interests of a developing country”.

“…In light of the expressed desire of the Indian producers to offer undertakings, we consider that the EC should have made some response upon receipt of the letter from counsel for TEXPROCIL dated 13 October 1997. The rejection expressed in the EC’s letter of 22 October, does not, in our view, indicate that the possibility of an undertaking was explored, but rather that the possibility was rejected out of hand”.

Special & differential treatment

- Provisions permitting the assumption of lesser obligations by developing countries
  - As a result of the single undertaking approach, developing countries could not pick and choose which agreements they wanted to become parties to. All the MTAs are binding on WTO Members. However, the plurilateral trade agreements are binding only Members which have accepted them
Special & differential treatment

- **Provisions permitting the assumption of lesser obligations by developing countries**

- Under the Agreement on Agriculture, for example, developing countries assumed lesser obligations than their developed counterparts.

  - **Tariffs:**
    - Developed countries to reduce their tariffs by 36 per cent over a six-year period, while developing countries by 24 per cent over a ten-year period.
    - Minimum tariff reduction on each tariff line: Developed countries -15 per cent, while developing countries 10 per cent.
Special & differential treatment

- **Domestic support:**
  - Developed countries to reduce trade-distorting domestic support measures by 20 percent over a six-year period, while developing countries by 13.3 percent over a ten-year period.

- **Export subsidies:**
  - Developed countries to reduce value and volume by 36 percent and 21 percent, respectively, while developing countries by 24 percent and 14 percent, respectively over ten years.

- Provisions have legal force. Cannot compel developing countries to assume more obligations than is envisaged.
Special & differential treatment

- Least-developed countries not obliged to undertake commitments under the Agreement on Agriculture.
- Why exemption?
- Paragraph 1 of the Decision on Measures in Favour of Least-Developed Countries. Broad exemption from assuming obligations.
- Good or bad policy? Consistency or lack of consistency?
Special & differential treatment

Under the Agreement on Subsidies and Countervailing Measures:

- Least-developed countries and developing countries whose GDP per capita is less than US$1000 exempted from the prohibition not to grant export subsidies, unless export competitiveness for two consecutive years.

- Other developing countries - Eight years to remove export subsidies, although could be extended upon request.

- Developed countries - three years to phase out export subsidies; Countries-in-transition - seven years

- Regarding import substitution subsidies, least-developed, developing, countries-in-transition and developed countries given 8, 5, 7 and 3 years, respectively to phase them out.
It is quite clear that these provisions are legally enforceable. Issue examined by the Panel and the Appellate Body in the *Brazil - Civil Aircraft* case. Canada alleged that Brazil had provided prohibited export subsidies to Embraer. Brazil argued, *inter alia*, that even if it was providing export subsidies, it had the right to do so under Article 27, as the eight-year period had not expired. The only obligation it had to satisfy was that it had not increased the level of its export subsidies since 1991. Canada disagreed. It alleged that Brazil was in contravention of Article 3 of the ASCM. Panel agreed with Brazil on this point. However, Brazil could not satisfy the other conditions in Art. 27.4
Special & differential treatment

- Provisions relating to transitional periods
- With the exception of the Anti-Dumping Agreement and the Pre-Shipmen... transitional periods for developing countries.
- Agriculture: Developed countries were given six years to implement their obligations, while developing countries were given ten years.
- TRIPS: Least-developed, developing and developed countries were given 11, 5 and 2 years, respectively to comply with their obligations. Additional 5 years for developing countries which were not providing product patents under their legislation.
Special & differential treatment

- **Provisions relating to transitional periods** (cont)

- TRIMS: Least-developed, developing and developed countries were given 7, 5 and 2 years, respectively to comply with their obligations.

- Customs Valuation: Developing countries which were not parties to the Tokyo Round Code on Customs valuation were given 5 years to comply with their obligations. Requests have been made by a number of developing countries for extension of the deadline.

- Provisions relating to transitional periods are legally enforceable. In *India Patents* case, the issue was not whether India could avail itself with the provisions of Art. 65 of the TRIPS Agreement, but whether it had complied with the provisions of Art. 70.8 of the TRIPS Agreement.
Special & differential treatment

- **Provisions relating to technical assistance**
- The technical assistance programme of the WTO has two basic objectives, namely to assist developing countries to comply with their obligations under the WTO Agreements, and also to facilitate their participation in the multilateral trading system.
- Envisaged that technical assistance would be provided by the WTO Secretariat and donor countries. Under Art. 9 of the SPS Agreement, for example, :
Special & differential treatment

- Members agree to facilitate the provision of technical assistance to other Members, especially developing country Members, either bilaterally or through the appropriate international organizations. Such assistance may be, inter alia, in the areas of processing technologies, research and infrastructure, including in the areas of processing technologies, research and infrastructure, including for the purpose of seeking technical expertise, training and equipment to allow such countries to adjust to, and comply with, sanitary or phytosanitary measures necessary to achieve the appropriate level of sanitary or phytosanitary protection in their export markets.”

- Where substantial investments are required in order for an exporting developing country Member to fulfil the sanitary or phytosanitary requirements of an importing Member, the latter shall consider providing such technical assistance as will permit the developing country member to maintain and expand its market access opportunities for the product involved.” (emphasis added)
Special & differential treatment

- Are these obligations legally enforceable?
- Opinions divided between developed countries on the one hand, and developing countries on the other.
- What about the use of the words “agree to facilitate” and “shall consider”? Are they meant to be mandatory? Probably not.
Special & differential treatment

- Special and Differential Treatment: Is it worth retaining the concept in the WTO legal framework?
- Which way forward – is it necessary to differentiate among developing countries – specificities?
- Proposals made in the implementation exercise to make all S & D provisions legally binding
- Realistic or not realistic?
- Proposals submitted by developing countries in the context of the on-going negotiations
Special & differential treatment

- Scepticism about the impact of S&dt on the economies of developing countries
  - Delay of policy reforms
- Concerns of developing countries
  - Best endeavours
  - Stringent rules of origin
  - Bureaucracy
  - Differentiation among developing countries/least-developed countries
- S&DT provisions not an integral part of the UR Agreements. An add-on to the agreements resulting in “minimum standards”
Results of the Fourth Ministerial Conference

- Special & differential treatment
- Small economies
- LDCs
- Technical assistance
- Trade, Debt and Finance, Transfer of Technology, commodities etc
The Doha Declaration

- Ministers at Doha recognised the problems that have prevented developing countries from making full use of the S&DT provisions

- Set out a work programme in para 44 of the Doha Ministerial Declaration:
  - reaffirmed that SDT is an integral part of the WTO
  - noted that there are concerns about the implementation of S&D provisions
  - directed that all S&D provisions should be reviewed to strengthen them and to make them more precise, effective and operational, and
  - and linked this work to the decision on ‘Implementation related Issues and concerns’
The Doha Declaration

The decision on ‘Implementation related Issues and concerns’ mandates the CTD

- to identify the S&D provisions which should be made mandatory and the implications of doing so
- to examine additional ways to make SDT more effective
- to report to the GC with recommendations by July 2002
- to consider how SDT could be incorporated into the architecture of WTO rules.
Special and Differential Treatment
Progress to date

To fulfil the mandate given at Doha, the Special Session of the CTD under the Chairmanship of Ambassador Ransford Smith of Jamaica organised its work around the following themes:

- Agreement-specific proposals
- Cross-cutting issues
- Monitoring mechanism for special and differential treatment
Phases in the S&D work programme

The S&D work programme can be considered to have been undertaken in the following phases:

I. Procedural phase Jan’02 – April’02
II. Submissions phase May’02 – Sep’02
III. Responses and discussions phase Sept’02 – Dec’02
IV. Negotiating phase Dec’02 – Feb’03
V. General Council phase Feb’03 – July’03
VI. The pre-Cancun phase July’03 – Sept’03
VII. Post-Cancun phase Sept’03 – December 05
VIII. Post Hong Kong to present
Developing countries tabled nearly 90 Agreement-specific proposals.

Fundamental differences between Members, coupled with the large number of proposals on the table, prevented the membership from meeting the original deadline of July 2002, which was subsequently extended by the General Council to December 2002 and later extended to February 2003.

Differences related both to the merit of some proposals and the forum in which they should be addressed.
Special and Differential Treatment Agreement-specific proposals

- Developed countries of the view that some of the proposals go beyond what Ministers had mandated at Doha eg., requests for indefinite extensions of transition periods, binding technical assistance and requests which would fundamentally change the nature of some Agreements

- Developed countries want most of the proposals to be referred to the relevant negotiating groups for consideration
Developing countries of the view that their requests fell within the ambit of the Doha mandate

That the terms of the mandate would invariably imply amendments to certain Agreements

Opposed to referring proposals to negotiating groups. Prefer all proposals to be addressed by the CTD Special Session

Strong linkage between progress on various cross-cutting issues, including graduation, differentiation and the definition of developing countries etc., and progress on Agreement-specific proposals
Special and Differential Treatment
Agreement-specific proposals

- Agreement reached in principle on four proposals in December 2002 and another eight in February 2003
- No agreement to recommend their adoption by the General Council
- Calls for the General Council to clarify para. 44 of the DMD and para. 12 of the Implementation Decision.
- To break the impasse, the General Council mandated its Chairman on 10 Feb 2003 to undertake consultations on how to take this matter forward
The Chairman of the General Council put forward an approach based on two fundamental premises:

- all proposals would be addressed without prejudice to the outcome, and that
- an informal categorization of the proposals was necessary to make the work more efficient (three categories)

Members also agreed to referrals and to consider possible changes in the existing language.
At the General Council level, further agreement was reached on an additional twelve or thirteen proposals bringing the number of proposals on which agreement had been reached in principle to around twenty-five.

Differences in the views of Members prior to Cancún whether the proposed decisions should be “harvested” at Cancún.

Developing countries “not in a hurry” to adopt the twenty-five decisions.
Cancún Ministerial Conference

- Agreement reached on three additional proposals bringing the number of proposals on which agreement had been reached in principle to twenty-eight

- At Cancún, the differences in the views of Members persisted. Whereas developed countries were in favour of harvesting the 28 Agreement-specific proposals, developing countries were opposed to it

- Developing countries argued that the 28 proposals lacked “economic value”
Post-Cancun Developments

- Work put on hold after the Cancun Ministerial Conference, as the GC Chairman’s consultations focussed on Agriculture, NAMA, Cotton and the Singapore Issues.

- The new Chairperson (Mr. Faizel Ismail of South Africa) asked Members to respond to the following three questions:
  - What did Members wish to do with the proposals on which they have already agreed to in principle?
  - How can the current discussions on S&D be made more productive and;
  - What suggestions did Members have on the way forward so as to fulfil the Doha Mandate of making S&D more precise, effective and operational.

- The Chairman reported at the TNC meeting on 21 April 2004 that there was broad support for his approach.
Post-Cancun Developments
July 2004 Decision

- Reaffirmation that development concerns form an integral part of the Doha Ministerial Declaration. Intention to fulfil the development dimension of the DDA

- Reiteration of the importance of enhanced market access, balanced rules, well targeted, sustainably financed technical assistance and capacity building programmes can play in the economic development of developing countries

- **S&D:** Reaffirmation that S&D provisions are an integral part of the WTO Agreements. Doha mandate recalled – review of all S&D provisions with a view to strengthening them and making them more precise, effective and operational
Progress thus far recognized – No consensus to adopt the 28 decisions agreed to informally at Cancún

CTD in Special Session to review all outstanding agreement-specific proposals and report to the General Council with clear recommendations for a decision by July 2005

Special Session to also address all other outstanding work, including on cross-cutting issues, the monitoring mechanism and the incorporation of S&D treatment into the architecture of the WTO rules and report to the General Council

WTO bodies to which category II proposals have been referred to expeditiously complete their review and report to the GC with clear recommendations for a decision no later than July 2005

No substantive progress in the run up to the HKMC
Hong Kong Ministerial Conference

- Five decisions adopted in favour of the LDCs, including a decision on duty-free quota-free (DFQF) market access
- Special Session and those bodies to which the Category II proposals had been referred to complete the review of the outstanding Agreement-specific and make clear recommendations by December 2006
- Special Session to resume work on the outstanding issues, including on the cross-cutting issues.
Decision on Duty-Free Quota-Free

- Developed-country Members shall, and developing-country Members declaring themselves in a position to do so should, provide DFQF market access for all products originating from all LDCs, by 2008 or no later than the start of the implementation period.

- Members unable to do so are permitted to provide DFQF market access for at least 97% of products originating from LDCs, defined at the tariff line level.

- The manner in which the decision is implemented to be set out by December 2006.
Status of DFQF Decision

- Japan has implemented the decision – 98% tariff lines
- Countries already providing more than 97% include:
  - Switzerland, Canada, Norway, New Zealand, EC, Australia
- India, Brazil and China in the process of undertaking internal consultations on how to implement the decision
Status of DFQF Decision

- No of issues of concern to the LDCs, including coverage, rules of origin, timing of implementation
- LDCs have tabled two submissions to contribute to the discussions on the decision, one on market access and the other on rules of origin
Total no. of proposals submitted in the Special Session: 88
Proposals referred to other bodies (Cat II): 38
Proposals in the Special Session (Cat I + Cat III): 50
Proposals remaining in the Special Session: 23
Proposals remaining with the Special Session: 18
Proposals remaining with the ATC: 16
Remaining Category I Proposals (5 African Group & 3 other dc’s): 8
Remaining Category III proposals (6 African Group & 2 other dc’s): 8
Agreed to in principle as part of pkg of 28 proposals: 27
LDC proposals agreed to in HK: 5
Proposals on the ATC: 2
Current Status

- Members were unable to meet the December 2006 deadline due to, among others, the suspension of the negotiations.
- Agreement-specific proposals
  - Text-based discussions on 7 of the 16 remaining Agreement-specific proposals.
- Outstanding Issues
  - Considering possible elements of the functions of a Monitoring Mechanism.
- DFQF Market Access
  - LDCs carrying out bilaterals on the issues relating to the decision, including on rules of origin.
Recent Cases on the Enabling Clause
Scope of the Enabling Clause(1)

The *Enabling Clause* adopted in 1979 as part of the results of the Tokyo Round. Provided permanent legal bases for the following:

- **Derogation** from the MFN principle to allow developed countries to grant trade preferences on a generalized, non-discriminatory basis to developing countries *(para. 2(a) and footnote 3)*

- **Derogation** from the MFN principle to permit deeper preferences to be extended to least-developed countries within GSP schemes *(para. 2(d))*

- **Derogation** from the MFN principle to permit developing countries to enter into regional trade agreements among themselves *(para. 2(c))*
Scope of the Enabling Clause(2)

- **Purpose of GSP schemes**
  - shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other Member *(para. 3(a))*
  - shall not constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on an MFN basis *(para. 3(b))*
  - shall in the case of such treatment accorded by developed Members to developing countries be designed and, if necessary modified, to respond positively to the development, financial and trade needs of developing countries *(para. 3(c))*
Scope of the Enabling Clause(3)

- **Purpose of GSP schemes**

  - With respect to para. 3(c), the delegate of St Lucia stated that: “A positive response would, in her view, mean addressing the specific needs of each country separately - something which could not be done if preferential treatment were made generalized and non-discriminatory (see para. 20 of TN/CTD/M/4; 17 July 2002).

  - Paraguay and other countries of the view that special and differential treatment granted to developing countries should be non-discriminatory in the sense that all benefits should be made available to all developing countries.

  - They argue that the grant of SDT, including through waivers, should not prejudice the interests of other developing countries.

  - Definition of “developing countries” has been raised.
Scope of the Enabling Clause(4)

- **Transparency Obligations / Consultations**
  - Obligation to notify the GSP scheme to the General Council and furnish Members with all relevant information *(para. 4(a))*
  - Preference-giving Member should enter into consultations when requested by any Member with respect to any difficulty or matter that may arise *(para. 4(b))*
  - The General Council shall, if requested to do so by such Member, consult with all Members concerned with respect to the matter with a view to reaching solutions satisfactory to all such Members *(para. 4(b))*
The developed countries do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing countries, I.e., the developed countries do not expect the developing countries, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs. Developed countries shall therefore not seek, neither shall less-developed Members be required to make, concessions that are inconsistent with the latter’s development, financial and trade needs (para. 5)
Scope of the Enabling Clause (6)

- The Non-Reciprocity Principle

Having regard to the special economic difficulties and the particular development, financial and trade needs of the least-developed countries, the developed countries shall exercise the utmost restraint in seeking any concessions or contributions for commitments made by them to reduce or remove tariffs and other barriers to the trade of such countries, and the least-developed countries shall not be expected to make concessions or contributions that are inconsistent with the recognition of their particular situation and problems (para. 6)
Scope of the Enabling Clause (7)

- The Non-Reciprocity Principle and Para. 17 of the Doha Ministerial Declaration

  “… [t]he negotiations shall take fully into account the special needs and interests of developing and least-developed country participants, including through less than full reciprocity in reduction commitments, in accordance with the relevant provisions of Article XXVIII bis of GATT 1994 and the provisions cited in para. 50 below [Part IV of the GATT 1994, Enabling Clause, the UR Decision on Measures in Favour of LDCs etc]. To this end, the modalities to be agreed will include appropriate studies and capacity-building measures to assist LDCs to participate effectively in the negotiations.
**Scope of the Enabling Clause(8)**

- Paragraph 12.2 of the *Decision on Implementation-Related Issues and Concerns* provides that the Ministerial Conference
  
  - “Reaffirms that preferences granted to developing countries pursuant to the ... Enabling Clause” should be generalized, non-reciprocal and non-discriminatory”
Scope of the Enabling Clause (9)

- Limitations frequently imposed by preference-giving countries:
  - Competitiveness
  - Specialization and development indices
  - Sectoral and country graduation
  - Linking of benefits to non-trade issues such as environmental and labour standards
  - Enforcement of intellectual property rights
  - To reward countries engaged in the fight against drugs
Cases initiated on the basis of the Enabling Clause

- **EC - Conditions for the granting of tariff preferences to developing countries (WT/DS246)**
  - India challenged the consistency of the EC’s Drug Arrangements with Article I:1 of the GATT 1994, as tariff preferences accorded under these arrangements were made available to only a select group of developing countries.
  - India also claimed that the Drug Arrangements could not be justified under the Enabling Clause nor under Article XX(b) of the GATT 1994.
Cases initiated on the basis of the Enabling Clause

- The EC claimed that Drug Arrangements fell within the scope of paragraph 2(a) of the Enabling Clause which excluded the application of Article I:1 of the GATT 1994.
- EC claimed that India had the burden of proving that the Drug Arrangements were inconsistent with the Enabling Clause.
- Further, it alleged that since India had not claimed a violation of the Enabling Clause, the Panel should not examine the consistency of its regime with the Enabling Clause (see dissenting opinion).
- Lastly, if the Panel should find that Article I:1 is applicable, then Drug Arrangements justified under Article XX(b) of the GATT 1994.
Cases initiated on the basis of the Enabling Clause

- On the issue of nature of the Enabling Clause, the Panel held that it was in the nature of an exception to Article I:1 of the GATT 1994.
- The Appellate Body upheld the Panel’s finding on this issue.
Cases initiated on the basis of the Enabling Clause

On the issue of whether or not Article I:1 could apply to a measure covered by the Enabling Clause, the Panel held that “as an exception provision, the Enabling Clause applies concurrently with Article I:1 and takes precedence to the extent of conflict between the two provisions ... To say that Article I:1 does not apply to measures under the Enabling Clause would mean that GSP imports from different developing countries could be subject to different taxation levels in the importing country’s domestic market. Such a result was clearly not intended by the drafters of the Enabling Clause”. 
The Appellate Body upheld the Panel’s finding on this issue:

“The EC argues that the Enabling Clause exists “side-by-side and on an equal level” with Article I:1, and thus applies to the exclusion of that provision. In our view, the EC misconstrues the relationship between the two provisions. ... [T]he Enabling Clause “does not exclude the applicability” of Article I:1 in the sense that, as a matter of procedure, the challenged measure is submitted successively to the test of compatibility with the two provisions. But, as a matter of final determination..., it is clear that only one provision applies at a time. This is what the Panel itself found when, after stating that “as an exception provision, the Enabling Clause applies concurrently with Article I:1, it added “and takes precedence to the extent of the conflict between the two provisions.”
Cases initiated on the basis of the Enabling Clause

- On the issue of which party bore the burden of proof of establishing the consistency or otherwise of the Drug Arrangements with the Enabling Clause, the Panel held that given the nature of the Enabling Clause as an exception to Article I:1, it was the EC which bore the burden of proof:
  - “It [was] sufficient for India to demonstrate an inconsistency with Article I.1. It [was] not the task of India to establish further violations of possible exceptions provisions that could justify the inconsistency of the EC’s measure with Article I:1. ...[I]t was for the EC to (i) to raise the Enabling Clause as an affirmative defence to India’s claim of violation of Article I:1, and (ii) to demonstrate the measure’s consistency with that provision”.
Cases initiated on the basis of the Enabling Clause

- The **Appellate Body** modified the Panel’s finding on this issue:
  - “[A]lthough the burden of justifying the Drug Arrangements under the Enabling Clause falls on the EC, India was required to do more than simply allege inconsistency with Article I. India’s claim of inconsistency with Article I with respect to the measure challenged here is inextricably linked with its argument that the Drug Arrangements do not satisfy the conditions in the Enabling Clause and that they cannot be justified as a derogation from Article I.”
Cases initiated on the basis of the Enabling Clause

- On the issue of whether or not the Drug Arrangements were consistent with Article I:1 of the GATT 1994, the Panel held that:
  - “Because the tariff preferences under the Drug Arrangements are accorded only on the condition that the receiving countries are experiencing a certain gravity of drug problems, these tariff preferences are not accorded “unconditionally” to the like products originating in all other WTO Members, as required by Article I:1”. It [follows] therefore that the tariff advantages under the Drug Arrangements are not consistent with Article I:1 of the GATT 1994”.
  - Issue not addressed by the Appellate Body as the EC did not appeal the ruling by the Panel on this issue.
On the issue of whether or not the Drug Arrangements were consistent with footnote 3 of paragraph 2(a) of the Enabling Clause, which states that GSP schemes should be non-discriminatory, the Panel expressed the view that consideration of paragraph 3(c) was necessary to determine whether the Enabling Clause allowed preference-giving countries to differentiate among developing countries in order to “respond positively to the development, financial and trade needs of developing countries”.
Cases initiated on the basis of the Enabling Clause

- As regards the scope of paragraph 3(c) of the Enabling Clause, the Panel held as follows:
  - [T]he elements relevant to “responding positively to the development, financial and trade needs of developing countries” ... Include the following: (i) the level of product coverage and depth of tariff cuts in general should be no less than the level and depth offered and accepted in the Agreed Conclusions, with the possibility of providing further improvements; (ii) the design and modification of a GSP scheme may not result in a differentiation in the treatment of different developing countries, except as provided in points (iii) and (iv);
Cases initiated on the basis of the Enabling Clause

- (iii) a priori limitations may be used to set import ceilings so as to exclude certain imports originating in individual developing countries where the products concerned reach a certain competitive level in the market of the preference-giving country; and (iv) differentiation is permitted among developing countries, in designing and modifying GSP schemes, in the case of special treatment to the least-developed countries, pursuant to paragraph 2(d). *No other differentiation among developing countries is permitted by paragraph 3(c)*" (Italics added)
Cases initiated on the basis of the Enabling Clause

- As regards the meaning of the term “non-discriminatory” in footnote 3, the Panel held that:
  - “[The footnote] required that identical tariff preferences under GSP schemes [must] be provided to all developing countries without differentiation, except for the implementation of a priori limitations”.

- The **Appellate Body** reversed the Panel’s finding on this point:
  - “[The] term “non-discriminatory” in footnote 3 does not prohibit developed-country
Cases initiated on the basis of the Enabling Clause

- Members from granting different tariffs to products originating in different GSP beneficiaries, provided that such differential tariff treatment meets the remaining conditions in the Enabling Clause. In granting such differential tariff treatment, however, preference-granting countries are required, by virtue of the term “non-discriminatory”, to ensure that identical treatment is available to all similarly-situated GSP beneficiaries, that is to all GSP beneficiaries that have the “development, financial and trade needs” to which the treatment in question is intended to respond.”
Cases initiated on the basis of the Enabling Clause

- On the issue of the whether or not the term “developing countries” in paragraph 2(a) meant all developing countries, the Panel held that:
  - “[T]he term “developing countries” should be interpreted to mean all developing countries, with the exception that where developed countries are implementing a priori limitations, developing countries may mean less than all developing countries”.
Cases initiated on the basis of the Enabling Clause

- The Appellate Body reversed the Panel’s finding on this point:
  - “[T]he term “developing countries” should not be read to mean “all” developing countries. ... Paragraph 2(a) does not prohibit preference-granting countries from according different tariff preferences to different sub-categories of GSP beneficiaries.”
Cases initiated on the basis of the Enabling Clause

**CONCLUSIONS OF THE APPELLATE BODY**

- Applying its understanding of the Enabling Clause to the facts, the **Appellate Body** held that the EC had failed to prove that its Drug Arrangements were justified under the paragraph 2(a) of the Enabling Clause.

- It noted that the EC itself had acknowledged that its Regulation as currently drafted made available the tariff preferences under the Drug Arrangements to only twelve countries.
Cases initiated on the basis of the Enabling Clause

- Such a "closed list" of beneficiaries cannot ensure that the preferences under the Drug Arrangements are given to all GSP beneficiaries suffering from illicit drug production and trafficking. The "non-discriminatory" obligation in footnote 3 of the Enabling Clause required that the tariff preferences under the Drug Arrangements were made available to all similarly-situated GSP beneficiaries.

- The Appellate Body therefore upheld the Panel's conclusion, for different reasons.
Cases initiated on the basis of the Enabling Clause

- On whether the Drug Arrangements could be justified under Article XX (b) of the GATT 1994, the Panel held that the EC had not been able to demonstrate that:
  - “(a) the Drug Arrangements are a measure designed for the purpose of protecting human life or health in the EC; or that (b) the Drug arrangements are “necessary” for the protection of human life or health in the EC. Consequently, [they] are not provisionally justifiable under Article XX (b). ... The EC has not demonstrated that the Drug Arrangements are not being applied in a manner constituting arbitrary or unjustifiable discrimination between countries where the same conditions prevail”.

- Not addressed by the Appellate Body
Cases initiated on the basis of the Enabling Clause

- **EC - Generalized system of preferences (WT/DS242)**
  - Thailand challenged the legal basis of the EC’s GSP. It argued that the scheme was discriminatory, as not all developing countries were entitled to the preferential rate of duty on certain products, including tuna.
  - It alleged breaches of the MFN principle and also the Enabling Clause.
  - Case was referred to the WTO Director-General under Article V of the DSU - Good Offices, Conciliation and Mediation
Cases initiated on the basis of the Enabling Clause

- **EC - Measures affecting soluble coffee (WT/DS209)**
  - Brazil challenged the compatibility of the EC’s GSP scheme with the relevant rules of the WTO (Article I and the Enabling Clause. Specifically, it alleged that the scheme was in breach of paragraph 4(b) of the Enabling Clause in the way it “progressively and selectively” reduced or eliminated preferences granted to specific products and/or beneficiary countries under its GSP scheme.
  - Pursuant to this scheme, Brazil’s benefits were initially reduced and later eliminated.
Cases initiated on the basis of the Enabling Clause

- **EC - Measures affecting soluble coffee (WT/DS209)**
  
  Brazil also challenged tariff preferences accorded under the special tariff arrangements for combating drug production and trafficking. These preferences benefitted products originating Andean and Central American Common Market countries, including soluble coffee. Their coffee entered the EC duty-free, while Brazil’s exports were subjected to custom duties *(see also WT/DS154)*

- The parties later notified a mutually agreed solution