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BEYOND SPECIAL AND DIFFERENTIAL TREATMENT

FRANK J. GARCIA*

Abstract: Developing country concern over flawed special and differential treatment (S&D) provisions has already contributed to the failed Seattle and Cancún WTO Ministerial Meetings. In order to succeed, the current WTO Doha Development Round must go beyond simply reforming existing S&D provisions, important as that is. Developing countries must re-focus WTO trade and development policy around the twin goals of *development* and *fairness*. Developing countries need a comprehensive agreement on S&D clarifying that development, not trade liberalization, is the number one economic policy goal of developing countries, and that fairness, not charity, is the basis for development. Such an agreement should also establish adequate domestic policy space for minimally-distorting development policies; create binding and unconditional preferential market access; provide adequate time to implement complex new trade agreements; create truly “precise, effective and operational” S&D provisions; and adequately fund technical assistance.

INTRODUCTION

The current Doha Development Round of World Trade Organization (WTO) negotiations has, for the moment, focused the international trade community’s attention on special and differential treatment (S&D). S&D is a category of measures through which developed countries respond to the particular risks and vulnerabilities that devel-

* Professor, Boston College Law School. This Article was first delivered as a paper at the 2002 Trade and Development Conference sponsored by the International Economic Law Interest Group of the American Society of International Law. My thanks to the conference participants for their helpful questions and comments. Portions of this essay were presented at a Reflection Group Meeting on Special and Differential Treatment with Special Reference to Small Economies, sponsored by the Caribbean Regional Negotiating Machinery, September 5–6, 2002. I would like to thank the RNM for the invitation to participate, and for the full and frank exchange of views at that meeting. I would also like to thank Ms. Soohyun Jun, Graduate Research Fellow at the Boston College Law School, for her invaluable comments and research assistance. Finally, thanks to the *Boston College International & Comparative Law Review* for publishing the Conference papers as a symposium. I would like to dedicate this Article to the memory of Robert Hudec, whose work has taught and inspired me.

oping countries face in international trade.¹ In its contemporary form, S&D has three main elements: market access, market protection, and technical assistance. The market access element recognizes that developed countries can support the economic development of developing countries by allowing them to export at preferential rates into their larger markets. The market protection aspect is essentially the principle of nonreciprocity, which recognizes that developed countries should not expect equivalent access or equivalent concessions in return. The provision of technical assistance recognizes that states rich in trade-related knowledge, and the resources to pay for it, should share that knowledge and financially support its implementation.

Although S&D has, in some form or another, been around since the 1950s, the 1986–1993 Uruguay Round was a watershed in the history of S&D and, more generally, in the relationship between developing countries and the multilateral trading system. The full effects of the changes wrought by the Uruguay Round, further discussed below, were not immediately understood. However, by the time of the failed Seattle Ministerial in 1999, there was a widespread sense among developing countries that S&D, and the Uruguay Round more generally, had failed to live up to their promise, and that the post-Uruguay Round system was not resulting in the sort of economic welfare gains developing countries had anticipated and bargained for.²

The 2001 Doha Ministerial Declaration³ and the related Doha Decision on Implementation-Related Issues and Concerns⁴ are intended to articulate the resolve of WTO Members to reform S&D as part of a comprehensive effort to respond to developing country concerns. Commentators have already expressed a degree of skepticism as to whether the Uruguay Round is indeed about development at all.⁵ The regrettable collapse of the Cancún Ministerial⁶ could either be a confirmation of this skepticism, or merely a stage towards eventual suc-

¹ On these risks and vulnerabilities, see generally FRANK J. GARCIA, *TRADE INEQUALITY AND JUSTICE* (2003); Dermot McCann, *Small States in Globalizing Markets: The End of National Economic Sovereignty?*, 34 N.Y.U. J. INT'L L. & POL. 281 (2001).

² See Dilip K. Das, *Debate at Seattle: The Way the Cookie Crumbled*, 34 J. WORLD TRADE 181, 190–93 (2000) (discussing factors contributing to Seattle failure).

³ WTO Ministerial Conference, Fourth Session, *Ministerial Declaration*, WT/MIN(01)/DEC/1 (Nov. 20, 2001) [hereinafter Doha Declaration].

⁴ WTO Ministerial Conference, Fourth Session, *Implementation-Related Issues and Concerns*, WT/MIN(01)/17 (Nov. 20, 2001) [hereinafter Implementation Decision].

⁵ See, e.g., Raj Bhala, *Poverty, Islam and Doha: Unmet Challenges Facing American Trade Law*, 36 INT'L LAW. 159, 165–67 and sources cited therein (2002).

⁶ *The WTO Under Fire*, THE ECONOMIST, Sept. 20, 2003, at 26–28.

cess—only time will tell. Either way, this is a historic and risky moment for developing countries, and we are not likely to see another “development” round in the near future. Thus, the stakes are high for developing countries to make the most of this one. What will this require?

For developing countries to emerge from the Round in a substantially stronger position, they must go beyond contemporary S&D in three ways, which will be discussed in Part II, sections A–C of this Article. First, developing countries must shift the terms of the trade and development debate away from the current emphasis on extra “adjustment” time and back towards a fundamental commitment to a paradigm of *development* and *fairness*, with trade policy a servant of both. Second, the WTO must address the shortcomings in the core policies of S&D: market access, market protection, and technical assistance. Third, the WTO must close up the many loopholes in existing S&D provisions by substituting justiciable language for aspirational language and engaging in the political negotiations this requires. Before turning to these three reform areas, an outline of the Uruguay Round and the development of S&D will be presented in Part I.

I. S&D AND THE URUGUAY ROUND

In order to understand the changes and problems wrought by the Uruguay Round, it is important to understand some of the history of S&D, specifically its introduction and development during the era of the General Agreement on Tariffs and Trade (GATT).

A. *S&D in the GATT*

In the beginning, there was no special and differential treatment.⁷ In the GATT of 1947, developing country members participated in GATT disciplines on an essentially equal basis and had to justify recourse to any nontariff barriers according to standard GATT principles and provisions.⁸

⁷ Prior to the beginning of GATT negotiations in 1946, there was no mention of S&D in any trade agreement. Robert E. Hudec, *GATT and the Developing Countries*, 1992 COLUM. BUS. L. REV. 67, 68 (1992). Although developing countries participated in the Havana negotiations, there was no formal recognition of them as a group or of their special needs in the eventual GATT 1947 text. CONSTANTINE MICHALOPOULOS, *THE ROLE OF SPECIAL AND DIFFERENTIAL TREATMENT FOR DEVELOPING COUNTRIES IN GATT AND THE WORLD TRADE ORGANIZATION* 2–3 (World Bank, Pol’y Res. Working Paper Series No. 2388, 2000).

⁸ See Hudec, *supra* note 7, at 69 (“minimal” recognition of S&D in GATT 1947 was of “little practical value”). GATT Article XVIII did allow exceptions for support of developing industries, but the provisions were not unique to developing countries and required prior

Two related factors changed this situation: the growth of development economics and the decolonization movement. First, economists studying the trade relationships between richer and poorer states highlighted the particular risks and vulnerabilities that smaller economies face in trade.⁹ Second, the decolonization movement resulted in a plethora of poor, newly independent states seeking admission to the GATT.¹⁰

These twin forces led to a series of development-oriented GATT revisions, beginning with the 1955 changes substantially revising Article XVIII and introducing Article XXVIIIbis.¹¹ Article XVIII was rewritten to clearly allow developing countries to enact market protection measures for infant industries and to more easily impose trade restrictions in the face of balance of payments problems.¹² Article XXVIIIbis, drafted to set out a framework for future GATT negotiations,¹³ stipulates that such negotiations take into account “the needs of less-developed countries for a more flexible use of tariff protection to assist their economic development.”¹⁴ Subsequently, in 1964, the GATT Contracting Parties¹⁵ adopted Part IV, adding a series of non-binding statements of principle that favored increased trade opportunities for developing countries.

The next milestone was the adoption of the Decision of 28 November 1979 on Differential and More Favorable Treatment, known

approval. In part for this reason, developing countries made more frequent recourse in the early 1950s to balance-of-payments-based exceptions under Article XII, which did not require prior approval but were also not specifically tailored to developing countries. See JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 639 (1969).

⁹ Pioneering studies included JACOB VINER, *INTERNATIONAL TRADE AND ECONOMIC DEVELOPMENT* 120–50 (1952); GUNNAR MYRDAL, *AN INTERNATIONAL ECONOMY: PROBLEMS AND PROSPECTS* (1956); and ALBERT O. HIRSCHMAN, *THE STRATEGY OF ECONOMIC DEVELOPMENT* (1958).

¹⁰ Hudec notes that by 1960 developing country membership in GATT had increased by 50%. This accelerated during the 1960s due to the admission of newly independent states, so that by 1970 75% of GATT membership consisted of developing countries. Hudec, *supra* note 7, at 70–71.

¹¹ See generally JACKSON, *supra* note 8, ch. 25.

¹² *Id.* at 638–40; see also General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XVIII, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

¹³ JACKSON, *supra* note 8, at 221.

¹⁴ GATT, *supra* note 12, art. XXVIIIbis, para. 3(b).

¹⁵ When GATT parties act officially and in concert, the treaty refers to them as “Contracting Parties.” Philip M. Nichols, *GATT Doctrine*, 36 VA. J. INT’L L. 379, 390 n.58 (1996) (explaining “Contracting Parties”).

as the “Enabling Clause.”¹⁶ The Enabling Clause became the framework document for trade and development in the GATT and firmly established the legal basis for the S&D regime.¹⁷ The basic approach of the Enabling Clause is to promote development by legalizing preferential trade and establishing boundaries that make it possible for developing countries to maintain the autonomous domestic policy space needed to pursue development policies.

The Enabling Clause also authorizes preferential trade through the Generalized System of Preferences (GSP),¹⁸ which prior to this had been pursued under a GATT waiver. The cornerstone of the Enabling Clause, however, is the principle of nonreciprocity in trade relations between developed and developing countries.¹⁹ By virtue of this principle and in recognition of their particular development needs and vulnerabilities, developing countries would not be expected to make concessions equivalent to those made by developed countries. For example, under this principle, developing countries did not have to join all 1973–1979 Tokyo Round GATT side agreements (i.e., for subsidies). Developing countries could also maintain different levels of obligation regarding tariff levels, nontariff barriers, and subsidies. Such nonreciprocity was deemed essential for ensuring adequate domestic policy space for development needs.

B. *The Uruguay Round*

The Uruguay Round is noteworthy for several well-known reasons, such as the strengthening of the trade dispute resolution mechanism

¹⁶ Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries (Nov. 28, 1979), GATT B.I.S.D. (26th Supp.) at 203 (1980) [hereinafter Enabling Clause].

¹⁷ See, e.g., Kele Onyejekwe, *International Law of Trade Preferences: Emanations from the European Union and the United States*, 26 ST. MARY'S L.J. 425, 454 (1995) (Enabling Clause established permanent legal framework for S&D).

¹⁸ The GSP, or Generalized System Preferences, is a voluntary system of trade preferences first articulated by the U.N. Conference on Trade and Development. See Hudec, *supra* note 7, at 72.

¹⁹ This expands upon the more limited nonreciprocity cited in Article XXXVI.8 of Part IV of the GATT, *supra* note 12 (“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.”). Paragraph 5 of the Enabling Clause, *supra* note 16, adds “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 contracting parties shall therefore not seek, neither shall less-developed contracting parties be required to make, concessions that are inconsistent with the latter’s’ development, financial and trade needs.”

and the creation of the WTO itself. Additionally, from the perspective of developing countries, the Uruguay Round is also noteworthy for the transformation of S&D through the drastic curtailment of the principle of nonreciprocity.

1. The Uruguay Round and S&D

The Uruguay Round altered the reciprocity component of S&D in two ways. First, the countries negotiating in the Uruguay Round adopted a new single-undertaking approach under which prospective WTO members had to agree to virtually all WTO disciplines.²⁰ Although this change was largely motivated by nondevelopment concerns, such as the notorious “GATT à la carte” phenomenon coming out of the Tokyo Round,²¹ it was to have significant impact on WTO development policy as well. Writing before the conclusion of the Round, Hudec was one of the few to catch the significance of this change:

At the very last minute, the terms of the [developed-developing country] bargain have further been altered by a radical new demand by the developed countries [that a single package approach be adopted] Under this approach, governments would have to decide between accepting everything or leaving the GATT. In essence, this new approach completely restructures the developed-developing country bargain, proposing to pay for all the new developing country concessions simply by agreeing not to destroy the market access they already have.²²

Second, although the Uruguay Round agreements retained many S&D elements,²³ these provisions as a whole also reveal a fundamental

²⁰ The single-undertaking approach did not include plurilateral disciplines in Annex IV to the WTO Agreement, such as the Agreement on Trade in Civil Aircraft, of interest to a small minority of states.

²¹ JOHN H. JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 214–15 (2002) (discussing Tokyo Round flaws).

²² Hudec, *supra* note 7, at 76.

²³ WTO documents cite the existence of 145 S&D provisions throughout the WTO Agreements. The WTO Secretariat has divided these provisions into six categories based on their function. See CTD, *Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions*, WT/COMTD/W/77 (Oct. 25, 2000) [hereinafter CTD, *S&D Provisions*]. These categories are (paraphrasing slightly): (i) provisions aimed at increasing trade opportunities (12); (ii) provisions under which Members should safeguard developing country interests (49); (iii) provisions offering flexibility of commitments (30); (iv) transitional time periods (18); (v) technical assistance (14); and (vi) provisions relating to

shift away from traditional nonreciprocity. Instead of maintaining full nonreciprocity of obligation, the system shifted to limited nonreciprocity of implementation.²⁴ Developing countries lost the option of maintaining different levels of obligation and instead were granted additional periods of time to *adjust* to the burdens of fully-implemented WTO obligations. This shift was not entirely a surprise to developing countries, which recognized, from their own anemic regional trade experiments, the failure of import substitution-style integration,²⁵ and they were ready to barter a more limited form of nonreciprocity in exchange for better market access in sectors such as agriculture and textiles.²⁶ However, this concession was a gamble and part of a larger bargain that developing countries sought from developed countries through the Uruguay Round.

2. The Grand Bargain Was a Bad Bargain

Overall, when one evaluates the Uruguay Round agreements from the perspective of developing countries, a system-wide problem that is not localized merely to the S&D provisions emerges. The Uruguay Round was supposed to be a sort of “grand bargain,” in which the wealthier North was supposed to reduce import barriers, especially in textiles and agriculture. In exchange, the South agreed to adopt new regulations in areas of interest to the North, such as intellectual property (IP), subsidies, and services.²⁷

least developed countries (22). These can still be broken down into three main groups: market access, market protection, and technical assistance.

²⁴ See, e.g., KIICHIRO FUKASAKU, SPECIAL AND DIFFERENTIAL TREATMENT FOR DEVELOPING COUNTRIES: DOES IT HELP THOSE WHO HELP THEMSELVES? (U.N. U. World Inst. for Dev. Econ. Res., Working Paper No. 197, 2000) (Uruguay Round marked a “clear departure” from traditional nonreciprocity approach); McCann, *supra* note 1, at 291 (Uruguay Round signaled “a clear movement away from a permanent lower level of obligation for developing states”).

²⁵ See MICHALOPOULOS, *supra* note 7, at 9–12 (developing countries were re-thinking economic models of trade and development).

²⁶ See *id.* at 14 (without formally abandoning the principle of nonreciprocity, developing countries changed their past approach and increased concessions); Hudec, *supra* note 7, at 75–77 (developing countries viewed increased access in key sectors as compensation for both Uruguay Round concessions and prior trade liberalization reforms).

²⁷ See Hudec, *supra* note 7, at 75–77. See generally Asoke Mukerji, *Developing Countries and the WTO: Issues of Implementation*, 34 J. WORLD TRADE 33, 39–64 (2000) (assessing the implementation of WTO agreements); Bonapas Onguglo & Taisuke Ito, *Proposed Legal Regime Within the World Trade Organization on Enhanced Market Access Conditions for Least Developed Countries*, in LEGAL ASPECTS OF INTERNATIONAL TRADE 15 (World Bank ed., 2001), available at <http://www4.worldbank.org/legal/publications/trade.pdf>.

Unfortunately, the results have been one-sided. For example, the North has maintained many of its domestic barriers in sectors of interest to developing countries, such as agriculture and textiles.²⁸ This failure is particularly disappointing to developing countries because the Uruguay Round did succeed in dismantling or phasing out the sorts of market protections they had previously maintained against overwhelming competition from the North. Indeed, the Uruguay Round succeeded in limiting nonreciprocity and restricting flexibility to pursue development-oriented policies such as subsidies. Moreover, time has clarified for developing countries the full extent of the problem inherent in the language of many S&D commitments. Many of the WTO's 145 S&D provisions were drafted in a "best efforts" style, and the results have been disappointing: wealthier states have not delivered, and such provisions are not enforceable.²⁹

These issues reflect a larger problem with the bargain—a general asymmetry in costs and benefits. For developing countries, the costs are clear and immediate: the loss of market protections and domestic policy space for subsidies, and the adoption of new legal obligations are expensive to implement. In contrast, the benefit of increased access and the hope that "best efforts" will indeed be made remain speculative and future-oriented.³⁰

Why did developing countries make such a bad bargain? First, since they had not fully participated in prior Rounds, developing countries lacked both experience and capacity in WTO negotiations.³¹ Second, there was a general lack of accurate knowledge as to the future effects of policies sought by the wealthier states.³² Third, commentators point to an intensified mercantilist attitude (our export interests first) on the part of the United States, the WTO's major power.³³ Fourth, the very creation of the WTO put developing countries over a barrel, because a "no" vote by a developing country would not have preserved the status quo and would have left that country *out* of the new organization.³⁴

²⁸ J. MICHAEL FINGER & JULIO J. NOGUÉS, THE UNBALANCED URUGUAY ROUND OUTCOME: THE NEW AREAS IN FUTURE WTO NEGOTIATIONS 3–4 (World Bank, Pol'y Res. Working Paper Series No. 2732, 2001) (analyzing agriculture and textile sector results).

²⁹ MICHALOPOULOS, *supra* note 7, at 17–18.

³⁰ *See id.* at 15.

³¹ FINGER & NOGUÉS, *supra* note 28, at 1.

³² *Id.* at 12 (reporting scarcity of accurate data on affected sectors).

³³ *Id.* at 13–14.

³⁴ *Id.* at 1.

II. BEYOND S&D

For these reasons, the concession-based, adjustment-oriented form of S&D that emerged from the Uruguay Round should not be the future of trade and development in the WTO. For developing countries, it is necessary in the Doha Round to go *beyond* the current form of S&D in three respects. First, developing countries must shift the framework in which S&D is debated, offered, and evaluated, from the current paradigm of adjustment and charity to a paradigm of *development* and *fairness*. Second, the WTO must restore the effectiveness of the three fundamental elements of S&D: market access, nonreciprocity, and technical assistance. Finally, the WTO must enforce the Uruguay Round bargain by addressing the weaknesses inherent in S&D provisions as currently drafted.

A. *Shifting the Paradigm: Development and Fairness*

When one views the 1986–1993 Uruguay Round, the 1999 Seattle Ministerial, and the current Doha Round together, a fundamental conflict over paradigms becomes apparent. The Uruguay Round effected a then-little-understood shift in the paradigm for developing countries in trade law, from the development model of the Enabling Clause to a new adjustment model. Since the Uruguay Round, the model for S&D, and for developed-developing country relations generally, has been adjustment assistance: extra time or extra help to “catch” up to a level playing field.

Seattle, Doha, and now Cancún can be seen as responses to the problems in this approach that have been recognized over time, as the implications of the paradigm shift for developing countries have become clearer. The adjustment approach has proven to be inadequate because the extra time has not been enough,³⁵ the extra help has not been forthcoming,³⁶ and the playing field is not level.³⁷ The time bomb built into the limited nonreciprocity model has ticked away and is now detonating since implementation periods are expiring, and developing countries are not ready.

³⁵ See *infra* Part II.B.2 for a discussion of the inadequacy of current implementation periods.

³⁶ See *infra* Part II.B.3 for a discussion of the inadequacy of the technical assistance regime.

³⁷ See *infra* Part II.B.1 for a discussion of obstacles developed countries have maintained to developing country trade.

The problems run deeper, however, than the mere need for extra time, real as it may be. There is a need to change the basic model and organize the future of trade and development doctrine in the WTO on the basis of development and fairness instead of adjustment and one-sided liberalization.

In a development model, the bottom-line question for the WTO should be what it can do to facilitate development, not what it is willing to allow to ease adjustment.³⁸ The premise, stated or otherwise, underlying the Uruguay Round model is that free trade *is* development or, at least, that free trade is both necessary and sufficient to ensure development. However, this premise has not worked. Free trade may be necessary, but it is not sufficient, particularly when developing countries are at a low level of industrialization and the new WTO regime advances towards such complex, development-sensitive issues such as investment and services trade. Even if the WTO system *were* fair, which it is not, competition according to reciprocal trade cannot be fair in view of the disparities among the players.³⁹ Although the economic debate rages on,⁴⁰ it seems that purely free trade can never be fair given the levels of disparity and market imperfections that exist.

Ultimately, a sound trade and development policy for the WTO depends upon the evolution of a new consensus in development economics. If free trade by itself is an inadequate prescription for development, as is suggested by many commentators,⁴¹ then WTO policy must more fully take into account the ways that free trade can harm or retard development. During the GATT regime, it was recognized that developing countries had to balance participation in the trade liberalization regime with “the requirements of ensuring equitable

³⁸ See FINGER & NOGUÉS, *supra* note 28, at 1 (“Decisions in the new [WTO agenda] areas should be structured as development/investment decisions—development issues to which a trade dimension can be fitted, *not the other way around.*”) (emphasis added).

³⁹ As one Caribbean trade negotiator has remarked in the author’s presence, the Christians and the lions did after all meet on a level playing field in the Coliseum, and we all know how that came out.

⁴⁰ See, e.g., Jagdish Bhagwati & T.N. Srinivasan, *Trade and Poverty in the Poor Countries*, AM. ECON. REV. PAPERS & PROCEEDINGS, May 2002, <http://www.columbia.edu/~jb38/paper2001/AEA%20Trade%20and%20Poverty%20in%20the%20Poor%20Countries.pdf>; Bhala, *supra* note 5, at 168–69 (summarizing economic arguments).

⁴¹ See, e.g., HA-JOON CHANG, *KICKING AWAY THE LADDER* (2002) (arguing that developed economies pursued aggressive industrial policy strategies, including infant industry and export subsidy measures, in their own development rather than the free trade ideology they now espouse); J. MICHAEL FINGER & PHILIP SCHULER, *IMPLEMENTATION OF URUGUAY ROUND COMMITMENTS: THE DEVELOPMENT CHALLENGE* 25 (World Bank, Pol’y Res. Working Paper Series No. 2215, 1999), <http://econ.worldbank.org/docs/941.pdf> (suggesting that international trade negotiations are inappropriate remedies for development issues).

socio-economic development, in which the role of the government was as important as the role of the market.”⁴² The new WTO regime risks great harm to developing country economies if it maintains an *ideological* stance on free trade, ignoring the need for this balancing act.⁴³ Given the disparity in power between states asserting this ideology and states complaining of its negative effects, the result can be a sort of free trade *uber alles*, benefiting no one in the long term.

Instead, where development needs suggest a deviation from trade orthodoxy, a development-oriented WTO will restore the necessary policy space. The Uruguay Round’s limitation of nonreciprocity has curtailed the domestic policy space needed to facilitate development.⁴⁴ A pro-development WTO will be open to calls to restore, in a prudent manner, such domestic policy autonomy. WTO policy with respect to developing countries must be pragmatically guided by what actually works for developing economies.

Second, the WTO must address developing countries’ claims about the basic *fairness* of the post-Uruguay system—both with respect to the domestic policies of developed states, and with respect to the sorts of accommodations developing countries need from Uruguay Round rules. Fairness is relevant to S&D not because S&D involves poor or disadvantaged states, but because justice is relevant to any inquiry into the structure of trade law.⁴⁵ The fact that S&D, in particular, is premised on inequality, however, does raise specific issues of fairness and distributive justice in general. Given the fact that the WTO is part of a set of institutions governed by a liberal internationalist vision, it seems appropriate to look for criteria of justice and fairness within liberalism itself. I propose, therefore, to supplement an empirical or pragmatic inquiry with a normative evaluation of these issues according to Rawls’s difference principle. Does the provision or policy in question operate to make economic inequalities work to the benefit of the least advantaged? If it does, then it meets the test for fairness; otherwise, it does not.⁴⁶

⁴² Mukerji, *supra* note 27, at 35.

⁴³ On the dangers inherent in “governance through ideology” within Bretton Woods Institutions, see Joseph E. Stiglitz, *Globalism’s Discontents*, THE AMERICAN PROSPECT, Jan. 1–14, 2002.

⁴⁴ See McCann, *supra* note 1, at 292 (“[T]he terms and operation of the WTO regime place major restrictions on the policy autonomy of small states without offering any corresponding enhancement of their ability to shape the evolution of the global trade system.”).

⁴⁵ See GARCIA, *supra* note 1, at 67–86.

⁴⁶ For a fuller statement of this approach, see generally GARCIA, *supra* note 1. See also Joel P. Trachtman, *Legal Aspects of a Poverty Agenda at the WTO: Trade Law and “Global Apart-*

B. *Restoring the Fundamentals*

With this reorientation in mind, I will maintain that S&D, as it emerged from the Uruguay Round, suffers from serious normative and pragmatic problems. In other words, aspects of post-Uruguay Round S&D are unfair, ineffective, or both. These two criticisms can be made with respect to specific aspects of all three core elements of S&D: market access, market protection, and technical assistance. Although post-Uruguay Round S&D retained these three core elements, they were changed in important ways, and their implementation has suffered from serious deficiencies.

1. Market Access

In tandem with a renewed focus on development instead of adjustment, as a matter of basic fairness, developing countries must continue to focus on addressing the obstacles to effective market access. There is nothing special or differential about expecting fair treatment. Developing countries must evaluate the fairness of two broad market access issues: the obstacles maintained in the domestic policies of developed states and the defective terms of their preferential market access programs.

a. *Domestic Policies of Developed States*

One of the most glaring fairness problems in the current WTO system involves the tremendous level of protection that developed countries maintain in sectors such as agriculture and textiles.⁴⁷ These sectors are important to developing countries, because many have a legitimate comparative advantage in such industries. However, developed country mercantilism in this area stymies market access for such products, despite economic evidence to the contrary.

For these reasons, a key goal for developing countries in the Doha Round will be to secure enforceable commitments on the part of developed countries, such as the United States and those in the European Union (EU), to dismantle their agriculture and textile regimes. This will involve commitments to eliminate or, at least, substantially reduce domestic agricultural subsidies for key developing-country exports. This will also require the progressive elimination of textile quotas and

heid," J. INT'L ECON. L. (2003) (WTO has essential role to play in addressing poverty as a primary agenda).

⁴⁷ See generally Mukerji, *supra* note 27, at 39–48.

the reform of protectionist origin rules such as “fiber-forward,”⁴⁸ which discriminate against efficient garment industries in developing countries.⁴⁹ The collapse of the Cancún Ministerial over just these issues does not bode well for negotiation of a fairer market access regime, or for the successful completion of the Round.⁵⁰ Should both be achieved, however, the work would not stop after such quotas and rules are eliminated. There must be continued monitoring of any developed countries’ use of anti-dumping tools and countervailing duties after quotas are eliminated. These instruments can be an effective way of restoring prior levels of protection, even after the rules have changed.⁵¹

Essentially, developed countries protect these markets because their industries in these sectors are not competitive in comparison with those of developing countries. For this reason, developed countries resist the dislocation and adjustment that liberalization will bring. However, maintaining these barriers in the face of contrary economic theory means *shifting* dislocation and adjustment from developed countries to developing countries, which cannot afford this burden. Which economy is better situated to absorb the costs of adjustment: Dominica with 40,000 citizens or U.S. regional or national economies?

b. *Preferential Market Access*

Preferential market access, as implemented through GSP-style programs, has three main defects that render it deeply flawed both normatively and pragmatically: (1) it is unilateral because it is implemented through discretionary nonbinding programs; (2) it is conditional because compliance or cooperation with a host of nontrade-related requirements is imposed as a condition of receiving the preferences; and (3) it is limited in scope, with competitive goods exclusions eliminating the most viable sectors from receiving the preferences.⁵²

⁴⁸ See generally U.S. CUSTOMS SERVICE, NAFTA FOR TEXTILES AND TEXTILE ARTICLES (2000), available at <http://www.exportimportlaw.com/FPF/NAFTAtextiles.pdf> (discussing in the context of NAFTA the operation of rules of origin for textiles).

⁴⁹ Stefano Inama, *Trade Preferences and the WTO Negotiations on Market Access*, 37 J. WORLD TRADE 959, 968–70 (2003) (citing effect of rules of origin in under-utilization of favorable tariff preferences).

⁵⁰ *Cancun’s Charming Outcome*, THE ECONOMIST, Sept. 20, 2003, at 11–12.

⁵¹ See generally Arie Reich, *Institutional and Substantive Reform of the Anti-Dumping and Subsidy Agreements*, 37 J. WORLD TRADE 1037 (2003) (surveying defects in AD/CVD rules rendering them susceptible to protectionist abuse).

⁵² See generally GARCIA, *supra* note 1.

Pragmatically, the effectiveness of GSP-style market access programs is open to question. First, their unilateral, conditional, and exclusionary nature erodes their economic value. Their unilateralism and conditionality undercut the predictability and reliability of these benefits, rendering them an uncertain incentive to increased domestic and foreign investment. Their exclusionary nature diverts investment away from the industries enjoying an actual or potential comparative advantage and towards industries benefiting solely from preference-based efficiencies.

Moreover, a larger question as to their enduring value hangs over preference programs as a whole.⁵³ As global tariff levels are reduced, the marginal value of such preferences declines, cautioning against over-reliance on preference programs as the cornerstone for development-oriented trade policies in a rapidly liberalizing global trade regime.⁵⁴

In addition to these pragmatic issues, GSP-style preference programs suffer from some patent fairness problems. Their unilateral, conditional, and exclusionary features exist to accomplish or protect important *donor* country interests, not to enhance the effectiveness of the programs for beneficiary countries. Normatively, this turns such programs on their head. Instead of being structured so as to benefit the least advantaged, these features actually weaken the capacity of such programs to benefit the least advantaged, in order to protect the more advantaged. In this way, the current market access regime fails the fundamental test of distributive justice: social policies involving resource distribution ought to put wealth and resource disparities at work for the benefit of the least advantaged.⁵⁵

In terms of market access, fairness requires nothing less than binding, unconditional, and unrestricted access. In Doha, developing countries should push for developed countries to commit to binding, unconditional, and unrestricted preferential access for all smaller economy goods and commodities exports. The Doha mandate already calls for duty-free, quota-free access for all products from least developed countries, coupled with a demand for comprehensive coverage

⁵³ See Bonapas Onguglo, *Developing Countries and Trade Preferences*, in TRADE RULES IN THE MAKING 118–20 (Mendoza et. al eds., 1999) (surveying deficiencies in preferential trade).

⁵⁴ See *id.* at 120–21. Alternative proposals include more aggressive improvements to existing preference regimes. See, e.g., Inama, *supra* note 49, at 974–76 (surveying possible structural improvements).

⁵⁵ See GARCIA, *supra* note 1, at 156–58.

(i.e., no a priori exclusions of competitive goods).⁵⁶ This exhortation offers a starting point, but it is not enough. Already, the EU has initiated a more sweeping proposal, the Everything But Arms initiative.⁵⁷ This initiative embraces all products from all developing countries, except weapons, and eliminates all duties on those products.⁵⁸ However, it is a flawed proposal because agriculture, the most important category, is the slowest to liberalize. Moreover, both the EU and WTO initiatives are not couched in the language of binding commitments; they are merely another set of discretionary programs.

As discussed above, preferential access alone will not work if successful implementation only results in developing country exporters employing dumping actions. Thus, there is a need to strengthen standards for dumping actions against developing country exporters.⁵⁹ The Doha Implementation Decision does state that members will give “particular consideration” to developing country concerns before initiating textile dumping actions,⁶⁰ but to what does this really amount? Such language is part of a larger problem of enforceability, which will be discussed below.

2. Market Protection

The market protection element of S&D suffers from similar pragmatic and moral failings. For developing countries, the Uruguay Round shift to limited nonreciprocity of obligation means that nonreciprocity, the key to maintaining a domestic policy space for development-oriented policies and to protecting their markets from premature openness to wholesale competition from developed country industries, is now temporary. Developing country flexibility is limited to only whatever additional time was granted for implementing Uruguay Round obligations.

Pragmatically speaking, the problem is that the transition periods have begun to expire, but developing countries are just not ready. It is possible that additional time (and money) would solve the problem for some agreements such as the WTO Agreement on Subsidies and

⁵⁶ Doha Declaration, *supra* note 3, ¶ 42.

⁵⁷ See Directorate General of Trade, European Commission, Everything But Arms (EBA) Initiative, http://europa.eu.int/comm/trade/issues/global/gsp/eba/index_en.htm (last visited Apr. 1, 2004).

⁵⁸ *Id.*

⁵⁹ See Reich, *supra* note 51.

⁶⁰ Implementation Decision, *supra* note 4, ¶ 4.2.

Countervailing Measures (SCM Agreement),⁶¹ but granting that time presents other difficulties. Currently, the WTO agreements in question call for developing countries to individually request that time, without clearly stipulating the substantive criteria whereby such time would be granted and the amount of time determined.⁶² For other agreements, such as the General Agreement on Trade in Services (GATS),⁶³ it is not clear that developing countries would ever be ready to face unprotected competition, even with longer transition periods. Yet there is no mechanism for permanent nonreciprocity as was formerly possible, which means that, ultimately, all development space is on a timetable to elimination.

The problem of limited nonreciprocity raises a fundamental fairness problem as well, which harks back to basic Aristotelian notions of distributive justice. In his *Nicomachean Ethics*, Aristotle clarified a basic element of distributive justice: just as equals are to be treated equally, unequals are also to be treated unequally.⁶⁴ The limited form of post-Uruguay Round nonreciprocity reduces the challenge of treating unequals unequally to a matter of additional time. This raises two problems. First, there is the risk that unequals will be treated insufficiently unequally if additional time is the only concession to their inequality, because additional time by itself may not be enough to respond to the nature and degree of inequality involved. Second, there is the risk that unequals have already been treated insufficiently unequally with respect to the *amount* of time (i.e., insufficient additional time may have been granted). As implementation periods expire and developing countries face the full force of competition from the developed world, the WTO must confront the likelihood that, in fact, unequals are being treated as if they were equals, which is a basic violation of fairness.⁶⁵

How should the issue of nonreciprocity be addressed in the Doha Round? There has been talk of returning the WTO to a two-tier struc-

⁶¹ Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 1125 (1994) [hereinafter SCM Agreement].

⁶² See GARCIA, *supra* note 1, at 179–81 (discussing defects in extension procedure).

⁶³ General Agreement on Trade in Services, Apr. 15, 1994, WTO Agreement, *supra* note 61, Annex 1B, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 1125 (1994) [hereinafter GATS].

⁶⁴ See Aristotle, *Nicomachean Ethics*, in INTRODUCTION TO ARISTOTLE 402–04 (Richard McKeon ed., 1974).

⁶⁵ See GARCIA, *supra* note 1, at 175, 181–82.

ture, which would restore full nonreciprocity of obligation for developing countries. However, this is politically unlikely given the concerted push by developed countries to establish the single-undertaking concept in the first place and the fact that the Doha Declaration reaffirms this approach. Nevertheless, the current form of a limited de facto two-tier system, established by nonreciprocity of implementation, can be improved. At Doha, developing countries did record an important success in this regard by securing an agreement among WTO members to extend the implementation period for the SCM Agreement, thus, preserving flexibility in the key development policy area of subsidies.⁶⁶ However, this does not address the broader problem.

The current form of limited nonreciprocity involves across-the-board, politically negotiated transition periods with individual ad hoc extension opportunities. This puts individual developing countries seeking extensions in a weak position and does not link the grant of time to underlying economic realities. One proposal from developing countries in the WTO Committee on Trade and Development (CTD) has been to impose substantive criteria for transition periods in the place of purely political bargaining. Such criteria could link additional time, and the amount of time, to objective economic criteria (such as debt level, industrial development level, and human development index) and social criteria (such as literacy and life expectancy rates).⁶⁷ The EU has also proposed, for example, that additional time be linked to stepped-up capacity building efforts and that extensions be granted and renewed until there can be demonstrated success in such capacity building efforts.⁶⁸ African states have gone even further and proposed a perpetual right to extensions of time upon notice to the relevant WTO body.⁶⁹ This goes furthest towards granting full flexibility but raises competing concerns over the potential for abuse of this extension right.

Since the Doha Declaration already reaffirms that the Doha agreements should take into account the principles in the Enabling Clause and Part IV of the GATT, it seems that the first priority would

⁶⁶ Developing countries should nevertheless press for an exemption for new agricultural export subsidies, which both the SCM and Agriculture Agreements prohibit. They should also press for a new category of development-related subsidies in the SCM Agreement.

⁶⁷ General Council, *Proposal for a Framework Agreement on Special and Differential Treatment*, WT/GC/W/442, ¶ 15 (Sept. 19, 2001).

⁶⁸ CTD, *Communication from the EC*, TN/CTD/W/13, ¶¶ 4–6, 12–13 (Aug. 1, 2002).

⁶⁹ CTD, *Joint Communication from the African Group in the WTO-Revision*, TN/CTD/W/3/Rev.1, ¶¶ 23–24 (June 24, 2002).

be to reaffirm the centrality of the full principle of nonreciprocity to WTO trade and development policy. Developing countries need to be able to protect their economies from the force of full competition, while at the same time pursuing both foreign investment and preference-based trade (while it lasts). The Enabling Clause clearly enumerated a series of principles that created for developing countries the freedom and flexibility to pursue development-oriented trade policies that might violate trade orthodoxy. Re-emphasizing the centrality of this principle would supply the framework within which both the substantive criteria and EU proposals could be adopted.

Another important goal is for developing countries to protect agricultural self-sufficiency. For developing countries, as well as for developed countries, agriculture is about more than food. Employment in the agricultural sector still plays an important role in developing countries' employment policies. Moreover, rural agricultural employment is important to easing the pressure on their urban areas. For these reasons, developing countries should continue to pursue a "development box" exemption in the WTO Agreement on Agriculture, permitting them to employ tariffs and nontariff barriers for food security crops.⁷⁰ They should also press for continued exemption from WTO actions on food security items in view of the expiration of the Agriculture Agreement's peace clause in 2003.

Many of these measures are not consistent with a pure free trade economic model or with the WTO's current ideological stance. However, the focus should not be on ideological purity but on effectiveness and distortion. If such measures are effective in the near future, then they will play an important role until other and more efficient industries can be developed. Moreover, given that the trade volumes involved are not large when compared to global trade, developing country implementation of protection-based development strategies would not significantly distort world trade, especially when compared to the agriculture policies of the developed world.

3. Technical Assistance

Another key element of development is aid, which in the trade arena comes in the form of technical assistance. In many respects,

⁷⁰ See generally THOMAS C. BEIERLE, FROM URUGUAY TO DOHA: AGRICULTURAL TRADE NEGOTIATIONS AT THE WORLD TRADE ORGANIZATION (Resources for the Future, Discussion Paper No. 02-13, 2002), available at <http://www.rff.org/rff/Documents/RFF-DP-02-13.pdf>.

technical assistance was supposed to be the white knight of the post-Uruguay Round S&D regime. Developed states were supposed to deliver the funds and knowledge needed to allow developing economies to implement these new and costly Uruguay Round regimes in the additional time granted. The moral imperative for technical assistance is clear: those possessing a disparity of trade-related knowledge could justify this disparity by placing such knowledge, and the funds to pay for it, in the service of the less-advantaged.⁷¹

Practically, the technical assistance aspects of the Uruguay Round have largely failed.⁷² Due in part to the “best efforts” nature of many technical assistance provisions,⁷³ delivery of technical assistance has been sporadic and under-funded. WTO Members did adopt the so-called Integrated Framework,⁷⁴ which was supposed to streamline and rationalize the technical assistance and capacity building efforts of wealthier states. However, this program has been judged a failure due to turf battles among participating institutions and a lack of adequate funding.⁷⁵

The issue has come up again in Doha, in the form of proposals for a special fund for least developed countries.⁷⁶ However, this would only involve pledges, and existing funding is minimal.⁷⁷ This tepid level of response is particularly disappointing, given the fact that the primary need for technical assistance is driven by the obligation to implement the complex new trade regimes that the wealthy states sought from the developing states in the Uruguay Round in the first place.

C. Enforce the Bargain: Make S&D More Precise, Effective, and Operational

The Doha Reform Agenda includes as a “cross-cutting issue” a charge to the CTD to make S&D provisions “more precise, effective and operational.”⁷⁸ This mandate comes in response to the problem of

⁷¹ For a fuller exposition of this imperative, see GARCIA, *supra* note 1, at 188–90.

⁷² See FUKASAKU, *supra* note 24, at 18–19.

⁷³ See *infra* Part II.C.1 for examples of “best endeavor” clauses.

⁷⁴ See World Trade Organization, The Integrated Framework for Least Developed Countries, at www.wto.org/english/tratop_e/devel_e/teccop_e/if_e.htm (last visited Apr. 15, 2004).

⁷⁵ See Subcommittee on LDCs, *Progress Report on the Integrated Framework for Trade-Related Technical Assistance, Report by the Director General*, WT/LDC/SWG/IF/17/Rev.1 (Apr. 17, 2001).

⁷⁶ *Id.*

⁷⁷ See Bhala, *supra* note 5, at 166.

⁷⁸ Doha Declaration, *supra* note 3, ¶ 44.

the unenforceability of S&D language in the Uruguay Round agreements, one of the failures of the Uruguay Round bargain. S&D has a firm legal basis in pre-WTO legal instruments, yet most of its provisions, including several cornerstones such as preferential trade, are not legally binding. This is an example in international trade law of the broader problem of the use of hortatory or aspirational language in international agreements involving developing countries. In the WTO, as the full implications of this problem became clear post-Uruguay Round, developing countries grew increasingly frustrated, judging that they had been tricked with respect to the extent of what they had been promised in Uruguay Round, which also helped to derail the Seattle Ministerial.

The charge to the CTD is therefore part of addressing the unfinished business of the Uruguay Round, by revisiting the S&D provisions of the various Uruguay Round agreements and proposing changes to existing S&D provisions that might render such provisions “more precise, effective and operational.” As part of this mandate, the CTD is to consider “the legal and practical implications for developed and developing Members of converting special and differential treatment measures into mandatory provisions.”⁷⁹

The CTD has met several times in Special Session, under the leadership of Ambassador Ransford Smith of Jamaica, to consider various communications from Members proposing changes to existing S&D provisions. Despite the Committee’s current deadlock on this issue, it is vital that developing countries identify and prioritize the provisions that are suitable, both substantively and politically, for such revision.

1. Language of Existing S&D Provisions

Recall that the WTO has identified 145 S&D provisions throughout the WTO Agreements that are divided into six categories based on their function.⁸⁰ In terms of the problem of enforceability, these provisions can instead be divided according to the nature of the language used to express the relevant level of trade obligation. This method of organization might be more useful for the decision as to whether and how to make these provisions mandatory.

When divided according to language, existing provisions fall into four categories:

⁷⁹ *Id.* ¶ 12.1.

⁸⁰ See CTD, *S&D Provisions*, *supra* note 23, ¶ 3.

- (1) provisions employing purely discretionary language;
- (2) “best endeavor” clauses;
- (3) de facto nonbinding or “fake mandatory” provisions; and
- (4) mandatory provisions.

The discretionary provisions employ language that is only permissive and that does not purport to create any obligation, moral or legal. An example would be paragraph 1 of the Enabling Clause, which states that “contracting parties *may* accord differential and more favorable treatment to developing countries.”⁸¹ This language quite specifically authorizes such treatment, and the most-favored nation violation it constitutes, without requiring parties to accord it such treatment.

“Best endeavor” clauses, which are quite prevalent in the WTO Agreements, express what might be termed a “moral” obligation on Members to “try their best.” For example, in Article 9 of the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement), “Members *agree to facilitate* the provision of technical assistance to other Members, especially developing country Members” with respect to SPS compliance.⁸² Similarly, GATT Article XXXVII.1 urges developed contracting parties to accord “*to the fullest extent possible . . . a high priority to the reduction and elimination of barriers to products . . . of . . . interest to less-developed contracting parties.*”⁸³ Lest this language be thought to be an anachronism confined to the GATT era or the Uruguay Round, the Doha Decision itself employs such language. For example, the Ministerial Conference “*urges*” Members to exercise restraint before challenging rural development/food security measures.⁸⁴

De facto nonbinding or “fake mandatory” provisions are a subcategory of “best endeavor” clauses, and they are the most complex in their legal effect. These provisions employ words of a mandatory nature but, due to their overall structure, achieve no actual binding legal effect. One example, drawn from the Doha Implementation Decision, states that Members “*will exercise particular consideration*” before initiating anti-dumping actions against developing country textile ex-

⁸¹ Enabling Clause, *supra* note 16, para. 1 (emphasis added).

⁸² Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, art. 9.1, WTO Agreement, *supra* note 61, Annex IA, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 1125 (1994) (emphasis added) [hereinafter SPS Agreement].

⁸³ GATT, *supra* note 12, art. XXXVII.1 (emphasis added).

⁸⁴ Implementation Decision, *supra* note 4, ¶ 2.1 (emphasis added).

ports that were formerly under quota.⁸⁵ “Will” is a mandatory word, but since “particular consideration” is not defined, the provision by itself attains no binding substantive legal effect.

The SPS Agreement provides another example. Article 10.1 dictates that Members “*shall take account of* the special needs of developing country Members” in the preparation and application of SPS measures.⁸⁶ “Shall” is the classic word of binding obligation in international treaties, but since “take account of” is not defined, the provision by itself attains no binding substantive legal effect.

Finally, we come to truly mandatory provisions, which use language creating concrete, enforceable commitments. For example, Article 27.2.b of the SCM Agreement gives developing country Members eight years to eliminate export subsidies.⁸⁷ This language was recently the subject of a WTO dispute involving Brazilian aircraft, in which the panel confirmed that eight years was eight years.⁸⁸

Although several existing S&D provisions are of a truly mandatory nature, the general state of the language of S&D obligations as surveyed here is troubling. The substantial majority of existing S&D provisions are either discretionary, “best endeavor,” or de facto nonbinding in nature. Legally, this means that most of the provisions upon which developing Members seek to rely are either unenforceable (“may”), or employ vague or undefined standards (“take account of”) with otherwise mandatory language (“shall”). Politically, this has contributed to the sense, expressed by many developing Members, that what they believed they had been promised as part of the Uruguay Round package of negotiated concessions has not in fact been delivered.

2. Proposed Changes to Existing S&D Provisions

The CTD is charged in Special Session to consider ways to make S&D provisions “more precise, effective and operational”—by, in part, exploring the legal and practical implications of rendering such provisions mandatory—and to report to the General Council its recommendations as to which provisions could and should be made manda-

⁸⁵ See *id.* ¶ 4.2 (emphasis added).

⁸⁶ SPS Agreement, *supra* note 82, art. 10.1 (emphasis added).

⁸⁷ SCM Agreement, *supra* note 61, art. 27.2.b.

⁸⁸ See WTO Report of the Panel, *Brazil—Export Financing Programme for Aircraft*, WT/DS46/R, ¶¶ 4.157, 7.49–51 (Apr. 14, 1999). The case involved the right of developing Members to provide subsidies for an eight-year period under Article 27 of the SCM Agreement. See *id.*

tory.⁸⁹ Certain S&D provisions could in fact be made “more precise, effective and operational” through amending their language into a more binding form. Specifically, the CTD should consider two types of changes:

- (1) changing purely discretionary terms into mandatory terms; and
- (2) changing de facto nonbinding provisions into truly mandatory provisions.

With respect to existing S&D provisions that are couched in purely discretionary terms, some of these provisions can be rendered more effective and operational by changing a term of discretion into a term of obligation. Often, this will constitute changing the word “may” to “shall.”

It should be pointed out, however, that not all discretionary provisions are suitable for this approach. For example, with respect to paragraph 1 of the Enabling Clause, changing the word “may” to the word “shall” raises many complex issues concerning what exactly has been promised with respect to the many sub-sections of paragraph 1.⁹⁰ Thus, a simple across-the-board approach of changing all “mays” to “shalls” might not be effective or appropriate.

With respect to the many “best endeavor” clauses, there is a second, more fundamental reason why merely changing a discretionary word to a word of obligation will not by itself render the provision more effective and operational. Characteristically, “best endeavor” clauses contain language exhorting Members to some vague level of care or attention. To make such provisions more “precise, effective and operational,” the exhortation in such provisions must also be amended to substitute a justiciable standard. For example, in the Doha Implementation Decision, Members are *urged* with respect to agriculture to “*exercise restraint*” before challenging rural development/food security measures.⁹¹ Changing this language to *require* Members to exercise restraint has the appearance of making the provisions mandatory, but as is the case with “best endeavor” clauses, this appearance is deceiving.

The problem lies with the use of the phrase “exercise restraint.” What does this mean? How would this be interpreted and enforced by a WTO panel? If the CTD is to make such provisions truly more “precise, effective and operational,” the phrase “exercise restraint” cannot

⁸⁹ Implementation Decision, *supra* note 4, ¶ 12.1.

⁹⁰ See Enabling Clause, *supra* note 16, para. 1.

⁹¹ Implementation Decision, *supra* note 4, ¶ 2.1 (emphasis added).

be left as it stands. What criteria are to limit a Member's discretion to challenge a green box measure? What findings must be made? What facts must be obtained? What procedural steps must be observed? These are the sorts of questions that must be asked, and the answers drafted into the provision, for such provisions to be rendered more "precise, effective and operational."

Two further examples can be drawn from the specific proposals India made in its communication on this subject to the CTD.⁹² With respect to Article 4.10 of the WTO Dispute Settlement Understanding (DSU), which currently reads that "[d]uring consultations Members *should* give *special attention*" to developing country Members' "particular problems and interests,"⁹³ India proposes two changes. India first proposes that the word "should" be replaced by "shall" so as to make this provision mandatory.⁹⁴ While it is formally correct that this change would make the provision mandatory, such a change by itself would not be enough to make it "more precise, effective or operational," for the reasons concerning "best endeavor" clauses discussed above.

For this reason, India proposes another change with respect to this language, namely a definition of "special attention,"⁹⁵ which has the effect of translating this vague standard into a requirement for an evidentiary showing, similar to the allocation of a burden of proof in panel proceedings. India proposes, for example, that if the complaining party is a developed Member, that Member should be required to "explain in the panel request as well as in its submissions to the panel as to how it had taken or paid special attention."⁹⁶

India's proposal to define "special attention" reflects its experience in the *Bed Linen* case.⁹⁷ That case concerned the WTO Anti-Dumping Agreement, which in Article 15 states that the possibility of "constructive remedies . . . *shall* be explored"⁹⁸ before imposing anti-

⁹² CTD, *Communication from India*, TN/CTD/W/6 (June 17, 2002) [hereinafter *Communication from India*].

⁹³ Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, art. 4.10, WTO Agreement, *supra* note 61, Annex 2, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 1226 (1994) (emphasis added) [hereinafter DSU].

⁹⁴ *Communication from India*, *supra* note 92, at 3.

⁹⁵ *Id.* at 3–4.

⁹⁶ *Id.* at 4.

⁹⁷ WTO Appellate Body Report on European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, WT/DS141/R (Oct. 30, 2000).

⁹⁸ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Apr. 15, 1994, art. 15, WTO Agreement, *supra* note 61, Annex 1A, LEGAL IN-

dumping duties. India contended that the EU had violated the Agreement by failing to explore such remedies prior to imposing a duty, and the panel entered a finding to this effect.⁹⁹

The second illustration from India's Communication concerns Article 21.2 of the DSU. This provision urges that, in a panel's surveillance of the implementation of its rulings, "[p]articular attention should be paid" to matters affecting developing Members' interests.¹⁰⁰ First, India proposes that "should" be changed to "shall" to render the obligation mandatory.¹⁰¹ Second, India proposes a carefully articulated set of timetables to operationalize the phrase "particular attention."¹⁰²

India's approach with respect to Article 21.2 thus goes further than its approach with respect to Article 4.10, since it proposes substantive criteria rather than simply the requirement that a party make an evidentiary showing. A weakness of the evidentiary approach is that, because it does not impose a substantive standard, a party can meet the requirement by showing it has "paid special attention" without the need to show it has adequately addressed the developing Member's needs. In this sense, it is like an obligation "to negotiate in good faith"—not an obligation to reach an agreement. For this reason, where possible the CTD should adopt the approach taken by India with respect to Article 21.2 and propose justiciable standards.

CONCLUSION

In tailoring the post-Uruguay Round system to meet their needs more effectively, developing countries must address serious market access problems due to the flaws in preferential trade policy and the obstacles developing countries face in key export markets such as agriculture and textiles. Moreover, in addressing such issues as imple-

STRUMENTS—RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 1125 (1994) (emphasis added) [hereinafter Anti-Dumping Agreement].

⁹⁹ This experience suggests a positive role for judicial elaboration of enforceable standards in interpreting weak S&D language. However, while this is a notable success for India and for developing Members generally with respect to the enforceability of S&D provisions, it should not be taken to mean that "best endeavor" clauses of this sort are now clearly enforceable without further change. Since there is, formally speaking, no *stare decisis* in WTO case law, the *Bed Linen* decision has no binding effect in formal terms on the interpretation of any other similar provision in any future proceedings before a WTO panel. Therefore, the need for the sort of amendment India proposes for Article 4.10 of the DSU remains unaffected.

¹⁰⁰ DSU, *supra* note 93, art. 21.2 (emphasis added).

¹⁰¹ *Communication from India*, *supra* note 92, at 4.

¹⁰² *Id.*

mentation periods for new Uruguay Round disciplines, there needs to be some proportionality between the time granted for implementation and the ability of developing countries to withstand such disciplines. Dismantling such obstacles and securing such additional time, and the technical assistance and funding needed to make such time meaningful, is not about charity or welfare; rather, such action concerns the basic fairness of the international trade law system. Finally, developing countries must push through the necessary reforms to address the weaknesses in Uruguay Round S&D language.

Developing countries need to go further if the Doha Round is to succeed in addressing their trade and development concerns. There needs to be a new focus for WTO trade and development policy, built around addressing system-wide fairness issues and restoring as far as possible the premium on development flexibility through the full principle of nonreciprocity. Perhaps the most effective reorientation of global economic law and policy around the twin imperatives of development and fairness will come only with the implementation of a more fully developed form of global wealth redistribution,¹⁰³ whether through some form of taxation scheme or through radically increased development aid.¹⁰⁴ However, the institutional and political obstacles to such policies are daunting for the time being.

In the near term, developing countries need a comprehensive agreement on S&D to emerge from the Doha Round. Such an agreement should do the following:

- (1) clarify that development is the number one economic policy goal of developing countries, and that the WTO is bound to support developing countries in their pursuit of this goal; and
- (2) state the basic principles for guiding trade and development policy in the WTO:
 - fairness in economic relations,
 - domestic policy space for development through meaningful nonreciprocity,
 - binding, unconditional preferential market access,

¹⁰³ Trade law already plays a redistributive role, for example, through S&D. See GARCIA, *supra* note 1 (discussing distributive aspects of preferential trade policy).

¹⁰⁴ See GARCIA, *supra* note 1, at 207–10 (arguing for the move to more explicitly redistributive policies as the next generation of trade and development policy). See generally Jon Mandel, *Globalization and Justice*, 570 ANNALS AM. ACAD. POL. & SOC. SCI. 126 (2000) (just globalization requires wealth redistribution); Trachtman, *supra* note 46 (need for institutional reform in international law to support redistributive obligations).

- “precise, effective and operational” S&D provisions, and
- adequately funded technical assistance.

Under traditional trade theory, subsidies and other measures adopted by developing countries under this approach might be considered bad policy. However, the primary moving force behind the Doha Round is the recognition that the current ideological approach to free trade is not working. The fundamental question, then, is what should be done in response? Should the developed WTO members continue to force liberalization on ideological grounds? Should the WTO return to a two-tier structure or otherwise enact a system of permanent subsidization as a form of international welfare?

There are no simple answers, and better prescriptions await resolution of the current disarray within development economics. However, the Doha Round cannot be delayed until economists can come up with a new consensus that will reliably indicate the route to growth and employment for smaller economies in the current economic and policy climate. For this reason, the WTO should seriously consider restoring the status quo, in line with the physician’s maxim: “First, do no harm.”

