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Regulatory Special and Differential Treatment in the WTO

From The Board

In the paper frenzy known as the WTO Doha Development Round, delegates and observers become gradually dazed by the array and complexity of the negotiations, especially as the topics grind forward to the Fifth Ministerial at Cancun.[1] From the proposals, one can see the outlines of intermediate conclusion and the consolidated mass flowing from the various WTO standing committees, working groups, the specialised negotiation committees, and so on. The paper trail behind the largest items is truly overwhelming, agriculture being the outstanding example where almost all WTO Members have generated at least one submission on one point or another. Fortunately, the big ticket items also benefit from the occasional summation generated by the Secretariat, a Committee Chair, or a government or organisation summation. These inform the context of the more oblique Ministerial Draft text, and somehow delegates manage to draw their aim and fire their strategies into the next stage of the negotiations.

The outsider cannot track all of this minutiae and is wise to approach the proceedings from some safer distance. The 'academic' method for accomplishing this is to adopt some 'systemic' subject that will permit a scan through various items running, and in turn to draw a more horizontal characterisation of the proceedings. This is actually a worthy alternative to that of achieving vertical competence in only one agenda basket, if one considers that many separate negotiating subjects are coping with the same or similar underlying substantive issues and themes. It is according to the component structure of the work programme that what is proposed and discussed for one agenda item is rarely connected to its directly related brethren being discussed next door.

Attempting to pick future themes in this horizontal mode presents some risks, as developments in real time are not often forecasted by anyone. Looking back, how many of us foresaw the events that followed the establishment of the WTO (a mere eight years ago) when terms like 'anti-globalisation protester' had not yet entered the trade politics lexicon? No matter how scholarly one drapes the exercise, attempting to predict future themes for the WTO is a form of analytical roulette.

1. At this writing consultations are being undertaken on the Draft Cancun Ministerial Text, JOB(03)/150Rev.1. The text outlines 26 separate negotiation categories.

Caveats made, there are two horizontal themes that could (or should) emerge to influence our way of looking at the multilateral trading system both post-Cancun and beyond. The first is the dedicated subject of the Doha *Development* Round itself, but especially considering the possibility of generating a more generalised, and perhaps legally pervasive, notion of 'special and differential treatment' (S&D) for the developing Members.

This first theme is raised to be a function of the second. This is the relationship between the resulting WTO Agreements and domestic regulatory sovereignty, especially to the extent that any Doha results would be perceived to elevate the organisation's mandate another incremental step into the role of adopting regulatory standard setting and providing for regulatory enforcement.

The relationship between these two themes is drawn if one (simplistically) subjects collective trade policy behaviour to the laws of physics, that for every action there is a like reaction. Upon this billiard table universe, the significant tariff cuts made through the early GATT Rounds led to the reactionary creation of the first generation of special and differential treatment regimes. The Enabling Clause Decision, which established beyond waiver the legal basis for non-reciprocal development preferences followed directly upon the Tokyo Round results in 1979. Action and reaction. While that Round also included a significant regulatory dimension, the 'code' results in those areas did not require the adherence of any of the developing countries. No action, no reaction.

The Uruguay Round did result in a single undertaking and Member obligations in the regulatory fields applied to all and were incrementally more pervasive. Although the intellectual property regime in the TRIPS is the single significant example of a non-trade related regulatory regime mandated and coupled with an enforcement obligation, other agreements display some elements of regulatory standard setting and compliance, including provisions on technical barriers to trade, phyto-sanitary measures, trade-related investment measures, and treatment of subsidies. In some cases the enhancements themselves are not significant, but of course the attachment of the obligations to the WTO dispute settlement mechanism has also had its impact on the perception of regulatory interference being promulgated by the WTO.

The billiard balls move slowly on this table. Developing country reaction time is governed also by lagging implementation and a gradual realisation of what has actually been obliged and how much it will cost. Whatever else has been attributed to the failure to commence the 2000 Millennium Round, the Seattle Ministerial was certainly a 'reaction' by a larger group of developing Members to slow down the new agendas in view of their limited regulatory compliance capacities. Since then, besides the establishment of a new consulting industry called 'compliance', the reaction has found a more constructive expression in the Doha Development Round with its emphasis upon treating

all the existing S&D provisions, 'with a view to strengthening and making them more precise, effective and operational'.[2]

This primary Doha item can be viewed as a form of new 'affirmative action', except that the exercise is perceived by the affected participants to be more of a 'catching-up' for S&D payments that should have been made in the Uruguay Round texts at the outset. Troublesome from their view is that the development dimension is not being taken into central account in the forward motion of the new regulatory proposals. These are the truly new actions, the two noteworthy examples being the WTO Investment Agreement and the Multilateral Competition Policy Framework. Since each have significant potential to affect a Member's allocation of domestic regulatory resources and priorities, the types of S&D regimes that are also being suggested in reaction may possibly take on some distinct permutations that have not been seen before in the WTO structures.

One basic principle suggested is that special and differential treatment should be expanded beyond the traditional granting of longer compliance periods and technical/capacity assistance to invade the hitherto sacred province of the national treatment obligation itself. This rule that requires a Member to not favour domestic production in the course of its regulatory treatment is a bedrock general principle in the GATT, and is a primary liberalisation objective for services in the GATS. It is a general obligation for the conduct of intellectual property laws in the TRIPS, and not incidentally, has also come into issue in the treatment of distinguishing pharmaceutical producers in the public health debate. Generally however, where WTO rules have not tended to mandate regulatory regimes of any particular character, the principle itself has also been safe from S&D considerations, thus far. To the extent that the WTO goes on to adopt regimes instructing Members on which systems of regulation shall be adopted, and applying standards in order to qualify their character, then the obligation of regulatory non-discrimination itself will be tabled. This discussion will turn on the viability of applying national treatment to the new regulatory frameworks in respect of the development levels of the Members.

How this may play out in the respective investment and competition arenas appears different as to each, but both have the potential of adopting an S&D national treatment. Since the Investment Agreement proposals seek to apply a system of negotiated and scheduled commitments similar to how services obligations are undertaken in the GATS, one can argue that this new agreement would have an inherent orientation toward special and differential treatment. If a Member will reserve the right to freely choose to permit or not permit the entry of investment, then that Member also incurs no general obligation to provide for post-admission national treatment until an entry commitment has

2. JOB(03)/150Rev.1, para. 11.

been made. However, the real negotiation space also tells developing Members that they will not be able to practically avoid making entry commitments in key sectors, and that they will then incur a loss of flexibility to favour domestic investment as an instrument for their overall development schemes. Thus, in the Committee reports, it is noted that certain exceptions to national treatment may be considered as an aspect of the negotiation modalities to be considered.[3]

The Competition Policy Framework has a different approach. Here the proposals call for a 'lex specialis' form of national treatment at the outset limited to *de jure* complaints where the domestic competition law discriminates among firms on the basis of their nationality. This limitation was made to pacify the competition authorities who could not tolerate the idea that a WTO panel might review their handling of an individual case. However, with this limitation, the authorities have also unanimously submitted that national laws do not engage in visible discriminatory treatment among firms on the basis of origin. This leads the proponents to conclude that the national treatment issue is something of a red herring. Nevertheless, the national treatment question has been at the centre of developing country concerns on competition policy since the outset of this discussion. Their focus is centred upon whether imposing the obligation with dispute settlement review is going to mandate a hierarchy among other domestic regulatory and industrial policies in favour of competition policy enforcement.[4] That the proposal to limit national treatment to *de jure*, when it *already* applies in the GATT and GATS context to cases *de facto*, has more or less escaped the debate. Thus, depending upon how one understands the current state of national treatment law as to competition laws, the proposal is either adding something new (action), or has already accommodated the S&D reaction.[5]

Either way, the corollary to the WTO's intellectual property agreement is repeatedly raised by developing Members feeling that the purpose of the entire proposal is to draw yet another regulatory regime into the WTO's dispute settlement mechanism in order to enhance the structure of market access regimes for developed country firms. Few have been convinced by the repeated assurances that a WTO competition policy framework, or an investment agreement for that matter, will not eventually directly interfere with the political and economic choices made between competition and regulatory authori-

3. *See* for example, WT/WGTI/7, 11 July 2003, para. 39.
4. Raised by the question of how national treatment applies to sectoral exclusions in competition laws, and there has not been a WTO case on this point. An additional issue raised is that national treatment provision would apply to firms and not to imported goods or services. In this sense it shares the 'non-trade related' characterisation that is made of the TRIPS.
5. However, to the extent that the principle is reduced to de jure application, it is also not S&D by nature since the benefit of diminished application is equally applied to both developed and developing Members.

ties in order to favour domestic development schemes.

For the trade economist, the entire business of dealing S&D treatment smacks hopelessly of the dreaded infant industry argument, albeit shifted to the regulatory domain. The extensive literature dedicated to debasing this strategy as a viable policy instrument can also be easily cited. However, the so-called Washington consensus prescription of accelerated privatisation and liberalisation has also moved past its prime. The institutions may still be demanding these accommodations, but governments are not listening. As Stiglitz pointed out, some of the best development outcomes over the last two decades rejected the shock treatment prescriptions, while some of the larger development disappointments adopted them.[6]

While the next wave of policy consensus regarding trade and development has yet to emerge, developing Members can agree on one point. Whatever beneficial linkages can be ascertained between trade/regulatory liberalisation and development, they do not want the WTO to be in the business of making these prescriptions for them.

Thus far, the developmental dimension in the Doha programme is being treated by the exercise of inventory and classification for possible greater legal bindings, essentially asking which 'best effort' clauses can be converted into 'shall provide' clauses. While this activity has been isolated within the province of the WTO Committee on Trade and Development (CTD), development considerations are also mandated for treatment in nearly all the work program items. Dozens of country submissions raising the development dimension have been filed by Members on many, if not most, of these agenda points.

Given the disparate nature of the programme itself, it is most unlikely that any generalised concept for special and differential treatment could be seen to result. However, developing Members continue to press the case in the separated venues for a more 'infused' notion for S&D. Sometimes, like in the competition policy area, this is raised by suggesting that S&D itself should be recognised as a 'core principle'. This would somehow guide the interpretation of rights and obligations within a regime. How this would actually translate into practice is certainly not clear, but two avenues can be identified. One is where the development aspects would be stated as post-violation exceptions, with the usual burden shifting exercise placed upon the developing Member to justify its national treatment violation for purposes commensurate with its development needs. Although such a defence may not sound like much of a winner, from the regime perspective it appears as something of an enhancement since the general exceptions of the GATT (Article XX) do not now contain any development exceptions. Another approach may be modelled on the treatment of exemptions in Community law, EU Article 81(3). This would provide a development-oriented basis for granting an exemption, and when

6. J. Stiglitz, (2002), *Globalization and its Discontents*, Penguin, chapter three.

applied by an authority, the burden to challenge would remain upon the complainant to show that this WTO-stated criteria had been misapplied.

Neither of these avenues have been taken up by the proponents in their outlines of the new regulatory regimes, and the proposals for actual negotiating modalities remain vague. This suggests that if these items go through to negotiations as a result of Cancun, then the S&D reaction will take longer to rise to visibility. As in the case of the TRIPS, it may also be a more severe reaction, and ultimately less negotiable when it does.

Trade delegates are famously sceptical of any positive developments that might emerge from WTO case law, and little attention is paid by them to prospects for S&D in the regulatory dimension. Perhaps ironic therefore that the WTO Appellate Body has appeared to outline the beginnings of how a generalised S&D principle could be formulated in WTO law and how it might be applied in the practice. The AB has established that WTO preamble text, expressing the shared objectives of the Members, is a source of context for interpretation of particular words within other WTO provisions. Thus, 'sustainable development' from the preamble has been drawn upon to define the context for the term 'natural resources'.[7] At the same time in the anti-dumping field, what was believed to be a soft law provision to provide for some special regard for developing countries was also ruled to be an active obligation.[8] These cases together suggest that a little preamble language together with some 'best efforts' text may go further to establish a legal basis for special and differential treatment than has previously been perceived to be the case. Since some S&D provisions can also be found in the context of internal treatment, the possibility of case law developments on this question should not be dismissed.

The prospect of any generalised framework for the development dimension either by negotiation or case rulings certainly receives an ambivalent, if not hostile, reception. For those who believe the system already has too many loopholes, the notion is probably the final hole in the boat, cumulating with all of the others, to finally sink the legal security of the multilateral trading system below the critical water line. They understand that only negotiated deals based upon *real* reciprocity will bring forth the guarantees of competitive market access that developing countries are also seeking to bank in the Doha round. Ultimately the development dimension is best served by this market access, and it is certainly preferable to S&D accommodations that lower the participation of Members in the WTO. However, if market access actually is delivered in this Round, it will not likely be tabled until the final days. In the

7. Thereby informing the GATT Article XX(g) exception to apply to living creatures as natural resources. US – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, paras. 129-131.
8. EC- Bed Linen From India, WT/DS141/AB/R. *See* F. Graafsma, 'Recent WTO Cases on Anti-dumping', LIEI, vol. 28:3, pp. 337–353, p. 343.

meantime there will be plenty of time for negotiators to look for creative ways to introduce S&D into the fabric of WTO regulatory constructions. This will occur whether or not these new items have gone forward at Cancun, or have reverted back for additional discussions in the working groups.

J.H.M., September 2003