

SPECIAL AND DIFFERENTIAL TREATMENT UNDER THE ANTI-DUMPING AGREEMENT, THE AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES AND THE AGREEMENT ON SAFEGUARDS

A COMPARATIVE ANALYSIS

Ashutosh Singh

Advocate, Allahabad High court & Former Assistant Professor of Law, DNLU, Jabalpur,

&

Utkarsh K. Mishra

Assistant Professor of Law, DNLU, Jabalpur.

Abstract : Special and Differential treatment measures are significant for the development and meaningful participation of developing and least developed countries in the world trade. In this context, it is relevant to examine the three most important remedial agreements of the World Trade Organisation, namely, The Agreement on Ant-Dumping measures, The Agreement on Subsidies and countervailing measures and the Agreement on Safeguards. A Comparative analysis of the provisions of these agreements in this paper reveals very significant observations.

I. INTRODUCTION: RELEVANCE AND PERSPECTIVES

On 30th October, 1947, governments of 23 countries signed the final Act of the General Agreement on Tariffs and Trade (GATT). The general agreement created a legal framework for mutual reduction in tariffs negotiated between the signatory governments. It contained, first, each government's commitment to tariff reduction (which is also called the Schedule of Concessions) and second, a code of behaviour regulating other forms of government interference with international trade. The GATT code of behaviour rested on three central principles. The first was that while governments will not be prohibited from protecting their domestic industries against foreign competition, all such protection should be in the form of tariffs. Under this principle, governments accepted the obligation to eliminate many other kinds of non-tariff barriers affecting the trade that had become prevalent in the pre-war years—above all, restrictions limiting the quantity of imports allowed. The second principle was that while there would be no a priori limits on tariff levels, governments would participate in periodic negotiations aimed at gradually reducing the existing levels. The third was the Most-Favoured Nation treatment principle requiring the governments to trade of all other GATT countries equally. Under the MFN principle, any advantage given to one GATT country had to be given immediately and unconditionally to every other country. The free trade discipline required by these three principles was rather modest—a far cry from free trade. Moreover the actual code of behaviour adopted in 1947 contained a substantial number of exceptions. Nevertheless, the rules of the general agreement did represent a coherent discipline requiring gradual trade liberalization. Working within these rules, the developed countries within the GATT achieved a very substantial reduction of trade barriers during the 20 years from 1947-1967, most of which still remains in place. The developing country members have never agreed to accept such disciplines. These developing world countries began by seeking to be excepted from the obligations in the GATT's code of behaviour. Later on they added the requests for special and more favourable treatment, both from each other and from the developed countries. The history of the GATT's relationship with the developing countries is the history of the developing countries asking for these demands to be met. The history begins with a relationship based essentially on parity of obligation, with only very limited, almost taken, exceptions. Over the years the relationship has gravitated in seemingly inexorable fashion towards the one sided welfare relationship demanded by the developing countries. This relationship is one in which developing countries are excused from the legal discipline while the developed countries are asked to recognize a series of unilateral obligations, based on the economic need and to promote the exports of the developing countries. The same relationship persisted even when Marrakesh agreements establishing the WTO was signed and GATT 1994 came into being i.e GATT 1947 with modifications along with 12 other agreements. This time, in the new GATT system, special provisions for the developing countries found place in different covered agreements as well making the said relationship much more explicit and clear. The aim of this research work is to look into the special and differential treatment given to the developing and least developing countries in the three covered agreements pertaining to the three trade remedies which have been provided under the modern GATT system i.e Anti-dumping, Subsidies and Counterveiling measures and the Safeguards measures. With the aim of studying the nature of Special and differential¹ treatment given to the developing and least developing countries, this research report also aims to finally establish a comparative analysis between the S & D treatment in three trade remedies' regimes. The second section of the paper deals with a brief historical analysis of the S & D treatment under the GATT regime. The Third section focuses on the justifications generally given for the existence of such treatments. Fourth section deals extensively with the S & D treatment regime in the three covered agreements. The fifth section is an attempt to showcase a comparison between the three regimes in relation to the level and nature of the S & D treatment being afforded to the developing and least developing countries. The last section gives the concluding remarks on the topic at hand.

II. HISTORICAL ANALYSIS OF THE 'S & D' TREATMENT UNDER THE GATT REGIME

One of the most contentious issues faced in the Multilateral trading system is the issue of the differentiated rights and obligations between the developed and the developing countries. Since its creation in 1947, the developing countries have not benefited that much as the developed countries have.ⁱⁱ The issue of favorable treatment for developing countries has a long history in GATT/WTO system. When GATT was established, 11 of the original 23 contracting parties were the developing countries.ⁱⁱⁱ The GATT contained no explicit provision giving special concessions for the developing countries. Soon after the negotiations, the developing countries identified special challenges that they faced in the international trade regime. Later, the GATT review session (1954-1955) was the first occasion in which special provisions were adopted to address the needs of the developing countries as a group within the GATT. One of the main provisions agreed upon by the countries were pertaining to the balance of payments problems of the developing countries. In the 12th session of the GATT, the contracting parties decided to study the problems of the developing countries and a panel of experts was set up to do the same. The Haberler Committee report confirmed that developing country export earnings were insufficient to meet their developmental needs.^{iv} In 1964, GATT adopted a specific legal framework within which the concerns of the developing countries could be addressed.^v During the Kennedy round negotiations, the developing countries did not get together and address the issue of the anti-dumping mainly, on the pre-conceived notion that only the industrialized nations could engage in dumping. Irrespective of all the reasons, none of the developing countries signed the 1967 code.^{vi} The Tokyo round negotiations finalized many 'codes' to define and codify key legal rights and the obligations of the developing countries under the GATT. The Tokyo declaration recognized the Special and differential treatment approach towards the developing countries. The 'Enabling Clause' provided for differential and more favourable treatment, fuller participation of the developing countries, element of reciprocity and also covered a generalized system of preferences for S & D provisions under the GATT covered agreements and also for providing S & D treatment to the least developing countries.^{vii} The Enabling Clause however failed to increase the participation of the developing and the least developing countries under the multilateral trading system. The Uruguay round of negotiations for the first time showed a change in the trend towards the negotiating history of GATT. Most of the developing countries showcased a higher level of commitment towards the GATT obligations than ever before. The reason was the concept of 'Single undertaking' i.e either 'take whole' or 'leave whole'. And in almost all WTO covered agreements, the S & D provisions were included.^{viii} The WTO Committee on Trade and Development had classified the S & D provisions into six categories, as shown in the figure below:

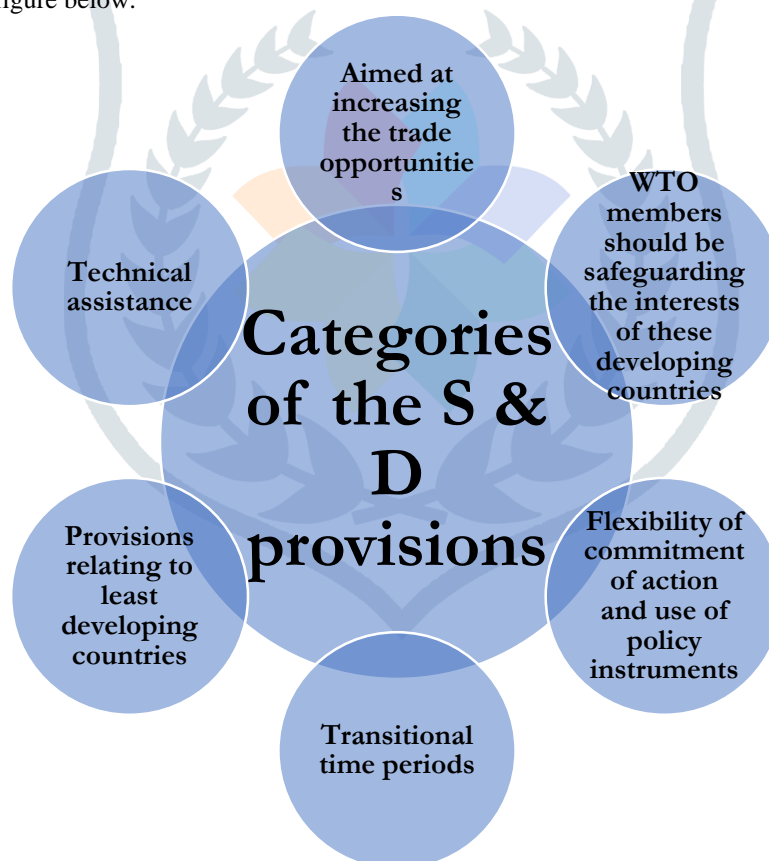


Fig 1: Categories of S & D provisions as under GATT covered agreements

At present, almost all the GATT covered agreements contain the provisions for the special and differential treatment of the developing and the least developing countries. But they differ in terms of the fashion in which they are worded and the aim that these provisions contain in themselves. And this difference in the nature of the S & D provisions can be attributed to the categorization done by the WTO committee on Trade and development.

III. JUSTIFICATIONS AND APPROACHES FOR THE 'SPECIAL AND DIFFERENTIAL TREATMENT'

The GATT/WTO policy of Special and differential treatments of the developing and the least developing countries can be supported or attacked by certain grounds, some legal and some economical. However, to understand the concept and idea behind the existence

of S & D provisions in the three GATT covered agreements that this project report pertains to, it is highly imported to understand the basic ground and foundations on which these S & D provisions are based and argued. These have been discussed in brief as follows^{ix}:

III.1.The Equality Doctrine

This doctrine talks about the development of an equality principle in international trade law. This doctrine under the multilateral trade regime rejects the conventional and traditional understanding of equality whereby identical legal obligations are there for all the countries. Such a conventional equality has been tagged as a formal equality analysis and hence the doctrine of equality in international trade regime is that idea which requires legal rules that differentiate according to the needs and abilities of the each individual subject. Legal scholars have found GATT law to be important precedent in the international recognition of this principle. They see it as a law that taxes the rich more than the poor. So developing countries are taxed in that they are required to observe fewer obligations.

III.2 The Mercantilist Doctrine

Mercantilism is quite a familiar concept. It posits that nations again by expanding their exports because exports create larger markets for a country's own producers and thereby creating more profit for these producers and more employment for these workers. It likewise assumes that nations suffer a loss when they increase imports for the same reasons in reverse. Although this doctrine is thoroughly discredited amongst the professional economists of the world, however the doctrine still remains in political and business circles in the form of the most widely accepted explanation of how international trade works. Part of the mercantilism's political appeal is due no doubt to its congruence with the intuitive economic perceptions that selling (earning) is economically beneficial while buying (spending) is something that ought to be done less. These thrifty precepts can be seen most prominently in the widely held view that balance of payments surplus is optimal result in the foreign trade. Hence, instead of combating the mercantilist ideas directly, the governments today have chosen to justify the GATT's policy of reducing the trade barriers in mercantilist terms. Thus for example, GATT doctrine plays very strong emphasis on reciprocity, showing that reduction of trade barriers at home will be matched by a similar reduction abroad.^x

III.3. Infant-industry doctrine

Many legal scholars have made an assertion that the market forces facing developing countries contain an especially large number of imperfections and distortions, and that market-directed investment is therefore not optimal and the situation can be improved by a proper intervention on the part of the governments of these developing countries by means of trade protection because they do not have the sophistication to use more refined policy instruments. The primary case for such an intervention is the infant industry situation where potentially efficient can be identified, but where market forces will not make the needed and socially profitable investment-either because the capital market itself is imperfect or because additional investments are needed to overcome other distortions that will impair the functioning of an infant industry.

III.4. Doctrine of Preferences

Although not all the economic arguments advanced on behalf of the preferences are accepted, most economists would argue that preferences can produce some economic benefits for the developing countries. The main issue is not that whether such benefits can be achieved but whether the actual size of these benefits is large and can outweigh the considerable legal costs of such a legal policy. In theory, there seems to be no reason why tariff preferences for developing countries cannot produce economic benefits and that too long term in nature.

All the above justifications or approaches are generally cited by most of the legal scholars and thinkers to support the regime of special and differentiated treatment even under the trapezium of the trade remedies.

IV. S & D TREATMENT IN THE TRADE REMEDIES REGIME

Under the WTO, three kinds of trade remedies have been stipulated: Antidumping, Safeguards measures and the Countervailing measures in case of subsidies. All the three trade remedies are governed by three covered agreements under WTO and each of these agreements contain S & D provisions for developing and least developing countries. The aim of this part of the paper is to summarize and discuss in brief about these provisions in the respective agreements. These have been discussed as under:

IV. 1.The Agreement on the Implementation of Article VI of GATT (The Anti-Dumping agreement)

The special and differential treatment principle for the third world countries in the anti-dumping agreement has been stipulated in Article 15 of the Anti-Dumping agreement and which reads as:

“It is recognized that special regard must be given by the developed country members to the special situation of the developing country members when considering the application of the antidumping measures under this agreement. Possibilities of the constructive remedies provided by this agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country members.”^{xi}

The Panel in **EC-Tubes and Pipe Fittings Case**^{xii} held that under article 15, there is no requirement for any specific outcome set out in the first sentence of the Article 15 and even assuming that Article 15 imposes a general obligation on members, it clearly contains no operational language delineating the precise extent or nature of that obligation or requiring a developed country member to take any specific action. Similarly the panel in **EC-Bed Linen case**^{xiii} with respect to the second sentence of Article 15 said that the exact parameters of the word ‘explore’ occurring in the second sentence of Article 15 are quite difficult to cull out as the concept of ‘explore’ does not at all clearly stipulates any particular outcome. More importantly, the wordings of the article show that Article 15 does not require that ‘constructive remedies’ must be explored but on the other hand only the ‘possibilities’ of it have been taken into consideration. So there is a much leeway granted to the countries in this respect and hence if the countries show that there is no possibility, it in effect means there are no constructive remedies. Also, the panel in the same case rejected the argument that a ‘constructive remedy’ could also be a decision to not impose anti-dumping duty at all.

IV. 2. The Agreement on Subsidies and Counter-veiling measures

Subsidies can play an important role in the economic development programmes of the developing country members. To achieve this goal and provide some rules and disciplines for developing countries that are less strict than for developed country members, the ASCM agreement in Article 27 of the agreement stipulates the principle of differentiated treatment. Article 27 clearly states that the rule regarding the prohibition of the export subsidies as under Article 3 of the same agreement does not apply to the least developed countries and to the countries with per capita annual income of less than US\$ 1000.^{xiv} Similarly, certain subsidies which are generally actionable as under Article 7 of the ASCM have made non-actionable when granted by the developing country members in the context of the privatization programmes.^{xv} Secondly with respect to the Countervailing duties, Article 27.2 of the SCM agreement provides that any countervailing investigation of a product originating in a developing country member must be terminated as soon as the investigating authorities determine that : 1) the overall level of the subsidies granted to the product in question does not exceed 2 per cent ad valorem or 2) volume of the subsidized imports represents less than 4 per cent of the total imports of the like product of the importing member. The latter rule however does not apply to the developing country members whose individual share of total imports represent less than 4 per cent, collectively account for more than 9 per cent of the total imports of the like product of the importing member.^{xvi} Thirdly, the developing country members are subjected to 8-year transition period in Article 27.2 (b) of the agreement subject to further extension on request.^{xvii} Also, upon a request made by a developing country member, the committee on subsidies may review the consistency of another member’s countervailing measure with special and differential treatment provisions.^{xviii}

IV. 3. The agreement on Safeguards

Under the WTO agreement, WTO members may take safeguard measures with respect to a product if increased imports of that product are causing or threatening to cause serious injury to the domestic industry that produces like or directly competitive products. But imports originating in a developing country member are exempt from safeguard measures if 1) those imports’ share of the importing member’s imports of the product concerned does not exceed 3% and 2) total imports from those developing countries having less than a 3% individual import share do not account collectively for more than 9% of the total imports of the product.^{xix} Secondly, generally the safeguard measures are imposed since the entry into force of the WTO and lasting more than 180 days cannot be re-imposed until after a time period equal to the original duration of the safeguard with a minimum allowable non-application period of 2 years. For the developing countries, this re-imposition is allowed after the lapse of period equal to half the time that original measure was in place, although the 2 year minimum still applies.

V. COMPARATIVE ANALYSIS OF THE S & D TREATMENT IN THE THREE TRADE REMEDY REGIMES

If we compare the three trade-remedy regimes under the WTO, there is huge amount of difference between them in terms of the nature of protection and its limits for the special and differential treatment of the developing and least developing country members of the WTO. Some of the observations have been listed below:

V. 1. The Agreement on Ant-dumping

- ❖ The agreement on anti-dumping merely contains a suggestive S and D provision for only ‘developing countries’ and no specific mention of least developing countries has been made.
- ❖ The article 15 of the agreement is not founded on a realistic premise and is merely of a recommendatory nature. The relevant panel reports, for example in EC-Bed Linen etc have expressed the same fear.
- ❖ Unlike other agreements, the provision relating to S & D treatment under this agreement stipulates what other developed countries can do for developing countries and that too very vaguely.

V. 2. The Agreement on Subsidies and countervailing measures

- ❖ The S & D provision under this agreement is the most elaborate provision on differential treatment amongst the three covered agreements under the discussion.
- ❖ Secondly, it caters to both the developing and the least developing countries.
- ❖ It is based on a realistic premise and makes detailed considerations in relation to volume of imports from the developing countries.
- ❖ It has provisions relating flexible transitional periods, and also in relation to flexibility in commitment of action and use of policy instruments.
- ❖ However, it does not talk about the obligation of the developed country members towards the developing country members.
- ❖ There is no mention of any kind of technical assistance just like in the case of ant-dumping agreement.
- ❖ Also the role of the Committee on Subsidies has been high lightened and its existence has been attributed with much importance unlike in other covered agreements under the discussion.

V. 3.The agreement on Safeguards

- ❖ This agreement seems to have a better approach than the anti-dumping agreement in the sense that it provides much clarity and is definitive too.
- ❖ It talks only about the ‘developing’ countries.
- ❖ It does not mention about any obligation on developed country members towards the developing countries and also no provision exists therein in relation to technical assistance.
- ❖ What is appreciative about the provision here is that it embodies the transitional period paradigm of the S & D treatment and also definitive flexible import related provisions for the developing countries.

VI. CONCLUSION

In view of the comparative analysis made in the preceding chapter, it must be mentioned that the Anti-dumping agreement contains a S & D provision which is almost a dead letter in the agreement. Secondly none of the covered agreements have any provisions relating to technical assistance for the developing and the least developing countries under the WTO. The agreement which can be seen as a complete package for the developing countries is the Agreement on Subsidies and Countervailing measures. However, what must be given heed to here is that the role of the respective committees under the three covered agreements must be increased and given importance too as the committees really play an important role of fastening the whole process of stabilization for the developing the least developing country members. Although it can be argued that S & D provisions under these three covered agreements have been designed in accordance with the requirements of the respective agreement, it is pertinent to note that uniformity in the nature of the S and D treatment provides a legitimate expectation and sanctity to the third world countries in relation to the three trade remedy regimes.

Endnotes

- ⁱ It is hereinafter referred to as ‘S & D’ treatment.
- ⁱⁱ WTO Secretariat, ‘Participation of developing countries in the World trade: Recent developments and trade of Least developed countries’, WT/COMDT/W/65, 15 Feb, 2000.
- ⁱⁱⁱ Those countries were Brazil, Burma, Ceylon, Chile, China, Cuba, India, Lebanon, Pakistan, Rhodesia, and Syria.
- ^{iv} A. Keck and P. Low, ‘Special and differential treatment in the WTO: Why, When and How?’, WTO Working Paper ERSD-2004-03 (Geneva), May, 2003.
- ^v Part IV of the GATT.
- ^{vi} M. D. Gupta, ‘Shaping the WTO Anti-Dumping agreement: A developing country’s perspective’, Foreign Trade Review XXXVI, No 3 and 4 (New Delhi), Oct 2001 and March 2002.
- ^{vii} T. E. Ibrahim, ‘Developing Countries and The Tokyo Round’, Journal of World Trade 12, no 1 (1978) at 16.
- ^{viii} C. Michalopoulos, ‘The role of Special and Differential Treatment for Developing Countries in GATT and the World Trade Organization’, World Bank Working Papers (Geneva), 2004.
- ^{ix} Robert E. Hudec, ‘Developing Countries in the GATT legal system’, Cambridge University Press, 2011 at 123-134.
- ^x Peter H. Lindert, Charles P. Kindleberger, International Economics, 8th Edition (Homewood, Illinois: Richard D. Irwin, 1982) pp 112-126.
- ^{xi} Article 15 of the Anti-Dumping agreement.
- ^{xii} Panel Report, EC-Tube or Pipe Fittings (2003), para 7.68.
- ^{xiii} Panel Report, EC-Bed Linen (2001), para 6.233.
- ^{xiv} Article 27.2 of the SCM agreement; Also see Panel and Appellate body Report in Brazil-Aircraft (1999).
- ^{xv} Article 27.13 and 27. 9 of the SCM agreement.
- ^{xvi} Article 27.10 of the SCM agreement.
- ^{xvii} Article 27.2 (b) of the SCM agreement.
- ^{xviii} Article 27.10 and 27.11 and 27.15 of the SCM agreement.
- ^{xix} Article 27.5 and 27.6 of the SCM agreement.