Philipp Scheuermann

Normative conditions
to make WTO law more responsive
to the needs of developing countries

Normative Bedingungen
der stärkeren Ausrichtung des WTO-Rechts
auf die Bedürfnisse von Entwicklungsländern

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Chapter 1: Introduction

The history of the multilateral trading system under the GATT/WTO is one of success. In six decades, the system has evolved from a negotiating forum, aimed at achieving tariff bindings and reductions, to a system that encompasses a deeper set of disciplines across a variety of policy areas. These cover market access for goods and services, harmonization of international standards, disciplines for domestic support and export subsidies, disciplines on contingency measures and the protection of intellectual property. The dispute settlement system, a central achievement of the Uruguay Round, asserts the primacy of rule-based dispute settlement over power-oriented dispute resolution in international economic law. As of January 2009, 153 Members seek to cooperate in the field of international economic relations and to establish a system that provides mutual benefits.

Despite this impressive record, there remain multiple challenges for the future evolution of the multilateral trading system. With the vast majority of WTO Members being developing countries, their successful integration is perhaps the most critical issue for future success. Multilateral trade rules need to take account of the special interests and needs of developing countries. They need to be supportive of development strategies. The launch of the Doha Development Agenda in 2001 reflects the awareness among WTO Members that trade agreements need to provide more benefits to smaller and weaker economies in order to earn the trust of all Members and ensure the WTO’s legitimacy. The development contribution will be the major yardstick to assess the outcome of current and future negotiations.

This study will examine how multilateral rules can be made more responsive to development needs. Today’s understanding of the development process is mainly informed by the goal of poverty reduction. This renders development not only a function of increasing income, but also of other factors such as strengthening health services, improving education or building reliable and transparent institutions. While progress along these lines depends on a number of complementary factors, it is sure that economic growth has a vital function in the development process. In this respect, trade can play a major role. Openness to trade allows economies to specialize, gives access to technological knowledge, and leads to higher investments. These are key elements of a successful growth strategy. However, positive effects depend on a variety of other conditions and individual circumstances of a country. While openness is central to economic growth in the long term, mixed outcomes of liberal trade reforms in the last decades have led to new controversy about the
successful path to openness. Given that different approaches to trade reform have proven successful in the past, there is no single recipe for successful trade policy. This has provoked renewed debate on the selective use of trade policy instruments in the development process, such as tariffs, subsidies or performance requirements. In this context, many developing countries feel that multilateral rules unduly constrain their policy space to pursue national development strategies.

During the first six decades of the multilateral trading system, three different normative concepts of how to take account of the special needs and interests of developing countries can be broadly distinguished. Initially, development was regarded as a domestic matter. The same multilateral trade rules applied to all Members with only few exceptions specifically available to developing countries. Following a review of the multilateral trade rules at the end of the 1950s, increasing attention was directed at the relationship between developed countries and developing countries in international trade. The principle of non-reciprocity in the relationship between developed and developing countries was instituted. Developing countries had the right to undertake fewer liberalization commitments than developed countries. In addition, the principle of variable geometry allowed them to refrain from signing the side agreements to the GATT. Thus, developing countries largely remained outside the process of multilateral trade liberalization. This process was reversed in the Uruguay Round, which led to the establishment of the WTO. New emphasis on reciprocity governed the relationship between developed and developing countries. Broad exemptions, as practiced earlier, were replaced by strengthened legal discipline and flexibility was curbed. Transitional periods and technical assistance became main elements of special and differential treatment of developing countries in WTO law.

Policy restrictions and high implementation costs following the Uruguay Round led to the widespread perception among developing countries that they had subscribed to a bad deal and that multilateral rules did not effectively respond to their interests. This dissatisfaction was a main driver for the launch of the Doha Development Round in 2001. However, while Members have repeatedly confirmed their commitment to development, progress in the current round has been disappointing. The reasons for this are manifold. Developed countries remain reluctant to make meaningful commitments in highly protected areas, in particular agriculture. Moreover, in their view, reform of special and differential treatment should not imply fundamental alterations in the balance of rights and obligations of Members. Many developing countries, by contrast, expect that the current round would bring about significantly improved market access in developed countries and renewed flexibility in rules.
An analysis of the current regime for special and differential treatment of developing countries reveals a lack of systematic approach to their treatment in WTO law. Consideration of developing country needs mostly takes the form of general, vague, and mostly unenforceable clauses. The system responds insufficiently to the diverse needs of developing countries, which differ enormously regarding their economic power, production structure, and institutional capacity. The imbalance seems to be caused by two principal analytical deficits. First, developing countries are largely treated as a uniform group under WTO law. This fails to account for differences among the membership. Second and strongly interrelated with the first issue, there is no systematic analysis of the concerns developing countries have with individual agreements.

In general, any reform of special and differential treatment will have to distinguish between market access and WTO rules. First, in the area of market access for goods, unilateral preferences remain the most important instrument for many developing countries. The responsiveness of preference schemes to beneficiary needs is mainly a matter of degree of concession, product coverage, and reciprocal conditions in national preference schemes. Failure to provide real benefits can be traced back to the lack of political willingness rather than legal constraints on Members’ sovereign policy decisions. In the area of services, the GATS mechanism in principle provides the requisite flexibility to take into account differences among Members. As of today, however, most of the potential remains unexplored. Meaningful commitments in areas of interest to developing countries, such as the movement of natural persons, remain fairly limited.

The second area of obligations concerns WTO rules, which cover various aspects of domestic regulation. A systematic approach in this area is required to effectively respond to different capacities and needs among Members. Extended implementation periods and non-binding provisions for technical assistance have largely failed to do so. A new approach to special and differential treatment has to address differences among developing countries more openly. A potential way to take account of developing country needs in a more refined manner would be to make the applicability of certain obligations dependent upon the fulfillment of specific economic and social criteria. However, as the needs of developing countries differ between several WTO agreements, a distinction needs to be drawn between different categories of WTO law. Each category needs to be analyzed separately with a view to their specific economic, political and legal parameters.

This study aims to contribute to the debate on the reform of special and differential treatment by pointing out potential ways to render WTO law more responsive to the needs of developing countries. It will first examine the
current debate on trade and development, followed by an assessment of the different approaches that the multilateral trading system has taken towards developing countries in the past. The subsequent chapters will analyze in depth the current rules for special and differential treatment in the area of trade in goods, trade in services, intellectual property and dispute settlement. Finally, a reform proposal for special and differential treatment will be devised. Core elements of this proposal include effective preferences for Least Developed Countries (LDCs) and similarly situated countries and the application of a new graduation principle in the area of WTO rules.
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