

Philip 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



Herbert Utz Verlag · München

Europäisches und Internationales Recht

herausgegeben von

Prof. Dr. Georg Nolte und Prof. Dr. Rudolf Streinz

Humboldt-Universität zu Berlin und Ludwig-Maximilians-Universität München

begründet von

Prof. Dr. Bruno Simma

unter dem Titel *Europarecht–Völkerrecht*

Band 73

Umschlagabbildung: »Ein Hauch von Kairo« © yxcyx / photocase.com



„Dieses Softcover wurde auf FSC-zertifiziertem Papier gedruckt. FSC (Forest Stewardship Council) ist eine nichtstaatliche, gemeinnützige Organisation, die sich für eine ökologische und sozialverantwortliche Nutzung der Wälder unserer Erde einsetzt.“

Zugl.: Diss., München, Univ., 2009

Bibliografische Information der Deutschen Nationalbibliothek: Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über <http://dnb.d-nb.de> abrufbar.

Dieses Werk ist urheberrechtlich geschützt.
Die dadurch begründeten Rechte, insbesondere die der Übersetzung, des Nachdrucks, der Entnahme von Abbildungen, der Wiedergabe auf fotomechanischem oder ähnlichem Wege und der Speicherung in Datenverarbeitungsanlagen bleiben – auch bei nur auszugsweiser Verwendung – vorbehalten.

Copyright © Herbert Utz Verlag GmbH · 2010

ISBN 978-3-8316-0975-8

Printed in Germany

Herbert Utz Verlag GmbH, München
089-277791-00 · www.utzverlag.de

Contents – Overview

Chapter 1: Introduction	1
Chapter 2: Trade and development	5
Chapter 3: The evolution of special and differential treatment.....	53
Chapter 4: Trade in goods	83
Chapter 5: Trade in services	161
Chapter 6: Protection of intellectual property	169
Chapter 7: Dispute settlement.....	179
Chapter 8: Reforming special and differential treatment.....	183
Chapter 9: Conclusion	251
Chapter 10: Deutsche Zusammenfassung	255
Bibliography	281

Table of Contents

WTO Appellate Body/Panel Reports.....	XVII
GATT Panel Reports	XVII
WTO Documents	XVIII
GATT Documents.....	XXI
Abbreviations.....	XXIII
Chapter 1: Introduction.....	1
Chapter 2: Trade and development.....	5
A. Development and growth	5
I. Development as a multidimensional concept.....	5
II. Classifications of developing countries and the worldwide amount of poverty.....	8
III. Growth in developing economies.....	10
1. Capital accumulation	10
a) Physical capital	10
b) Human capital	11
2. Knowledge and technological progress	12
3. Institutions and other deeper determinants	14
IV. Sectoral development.....	15
B. Openness and growth.....	18
I. Openness as growth driver	19
1. Trade and growth.....	19
2. Diffusion of knowledge	21
3. Trade and institutions.....	23
II. The debate on openness and growth	23
1. Import-substitution in developing countries.....	23
2. Liberal trade reform and the rise of the Washington Consensus	25
3. A new case for selective interventions.....	28
4. Conclusion	33
III. Trade policy for developing countries	35
1. Heterodox approaches	36
2. Effective management of adjustment processes.....	38
3. Discipline and effective control mechanisms	40
C. Trade liberalization and poverty	41

D.	Market access in developed countries	44
I.	Tariffs	45
II.	Support programs.....	47
III.	Standards.....	48
E.	Summary	49
Chapter 3: The evolution of special and differential treatment.....		53
A.	Special and differential treatment under the GATT	53
I.	The first phase of special and differential treatment: development as a domestic matter	53
II.	The second phase of special and differential treatment: non-reciprocity between developed and developing countries.....	55
1.	The <i>Haberler Report</i> and the first steps towards the principle of non-reciprocity	55
2.	The Tokyo Round: variable geometry and the Enabling Clause	58
B.	Special and differential treatment in the WTO.....	60
I.	The third phase of special and differential treatment: reciprocity in the Uruguay Round.....	60
1.	The move from market access to regulatory issues in the WTO	61
2.	New emphasis on reciprocity and legal discipline	64
3.	Overview of the rules for special and differential treatment after the Uruguay Round.....	66
a)	Increasing trade opportunities of developing countries.....	66
b)	Safeguarding the interests of developing countries.....	66
c)	Flexibility of commitments and use of policy instruments	67
d)	Transitional time periods.....	68
e)	Technical assistance.....	68
f)	Provisions for LDCs	69
II.	The fourth phase of special and differential treatment: the search for a new relationship between developed and developing countries in the Doha Round	69
1.	Developments in the Doha Round.....	70
a)	Launch of the Doha Round.....	70
b)	Developments until the Cancún Ministerial.....	71
c)	The way to the Hong Kong Ministerial	73
d)	State of affairs after Hong Kong.....	75
2.	Reasons for the stalemate	76

a)	Lack of agreement on the “development agenda”	76
b)	Further factors complicating progress	78
C.	Concluding remarks	79
Chapter 4: Trade in goods		83
A.	The General Agreement on Tariffs and Trade (GATT).....	83
I.	Art. XVIII GATT: flexibility for developing countries	83
1.	The preambular paragraphs.....	84
2.	Art. XVIII:A GATT: modification of tariff concessions	85
3.	Art. XVIII:B GATT: balance-of-payments measures.....	85
a)	The application of measures under Art. XVIII:B GATT.....	85
b)	The decline in usage	87
c)	The impact of <i>India – Quantitative Restrictions</i>	88
4.	Art. XVIII:C GATT: infant industries	91
5.	Art. XVIII:D GATT	92
6.	Summary	92
II.	Part IV of the GATT: safeguarding the interests and increasing the trade opportunities of developing countries:.....	94
1.	Art. XXXVI GATT: principles and objectives	94
2.	Art. XXXVII GATT: commitments.....	95
3.	Art. XXXVIII GATT: joint action	96
4.	The significance of Part IV since 1995.....	96
III.	The Enabling Clause: preferential market access for developing countries	98
1.	The Generalized System of Preferences (GSP).....	98
a)	Origin	98
b)	The waiver decision 1971	99
c)	The Enabling Clause 1979.....	99
2.	Legal difficulties associated with tariff preferences	101
a)	Discrimination among beneficiaries	101
(1)	Special treatment of LDCs	102
(2)	The EC-ACP relationship	104
(3)	US discriminatory preferences	107
b)	Differentiation and conditionality	109
(1)	The impact of <i>EC – Tariff Preferences</i>	109
(2)	Consequences	112
(3)	Preference conditionality under the current EC GSP+ scheme	113
(4)	Preference conditionality under current US preference schemes	115

c)	Product coverage and rules of origin.....	116
(1)	Product coverage	117
(2)	Rules of origin	118
d)	The question of graduation.....	121
3.	Economic considerations	123
a)	Preferences and economic growth.....	124
b)	Inducement of protectionist trade policy in developing countries	126
4.	Summary.....	128
B.	The Agreement on Agriculture (AoA).....	131
I.	General rights and obligations.....	132
II.	Special and differential treatment	134
III.	Doha Round.....	136
C.	The Agreement on Sanitary and Phytosanitary Measures (SPS).....	138
I.	General rights and obligations.....	138
II.	Special and differential treatment	139
1.	Safeguarding developing country interests.....	139
2.	Technical assistance	141
3.	Doha Round	142
D.	The Agreement on Technical Barriers to Trade (TBT)	144
I.	General rights and obligations.....	144
II.	Special and differential treatment	145
1.	Safeguarding developing country interests.....	146
2.	Technical assistance	147
3.	Doha Round	147
E.	The Agreement on Implementation of Article VII of the GATT (Agreement on Customs Valuation, CVA)	148
F.	The Agreement on Import-Licensing Procedures (ILP)	150
G.	The Agreement on Subsidies and Countervailing Measures (SCM)	150
I.	General rights and obligations.....	151
II.	Special and differential treatment	152
H.	The Agreement on Implementation of Article VI of the GATT (Anti-dumping Agreement, ADA)	155
I.	General obligations	155
II.	Special and differential treatment	156
I.	The Agreement on Safeguards (SA)	157
I.	General obligations	158
II.	Special and differential treatment	158

J. The Agreement on Trade-Related Investment Measures (TRIMs)	159
I. General obligations	159
II. Special and differential treatment	159
Chapter 5: Trade in services	161
A. Obligations under GATS	161
I. General obligations and disciplines	162
II. Specific commitments.....	163
III. The annexes and protocols to the agreement	164
B. Special and differential treatment	164
Chapter 6: Protection of intellectual property	169
A. Obligations under TRIPS.....	169
I. General obligations and principles	169
II. Specific obligations regarding the availability of IPRs.....	171
1. Patents.....	171
2. Other IPRs.....	173
3. Control of anti-competitive practices in contractual licenses.....	173
B. Special and differential treatment	173
1. Safeguarding developing country interests.....	174
2. Doha Round: public health and access to medicines	176
Chapter 7: Dispute settlement.....	179
Chapter 8: Reforming special and differential treatment.....	183
A. Preliminary observations	183
I. Addressing differences among developing countries	183
II. Specifying developing country concerns	185
III. Limitations	187
1. Creation of sub-categories	187
2. The political debate.....	188
IV. Next steps	190
B. Market access	191
I. Trade in goods	191
1. Preferential market access.....	191
a) Differentiation.....	193
b) Graduation.....	195
c) Product coverage and rules of origin.....	196

d) Preference erosion	197
2. MFN liberalization	198
II. Trade in services	200
1. Asymmetric liberalization interests and weak regulatory capacity	200
2. Major points for reform	202
C. WTO rules: impact on domestic regulation	203
I. Current reform proposals	204
1. Preservation of policy space	204
2. Resource-intensive obligations and national development plans	206
3. Issue-specific approach	209
4. Assessment	212
II. Standards liberalization	216
1. Developing country concerns	216
2. Applying graduation	218
a) Compliance with standards in developed countries	219
b) Introduction of SPS/TBT-conform procedures	219
III. Protection against imports, promotion of exports, and domestic support	221
1. Industrial development	221
a) Developing country concerns	221
b) Applying graduation in different agreements	222
(1) Art. XVIII GATT	222
(2) SCM Agreement	225
(3) TRIMs	227
2. Agriculture	230
a) Developing country concerns	230
b) Applying graduation	232
IV. Contingency measures	233
1. Developing country concerns	233
2. Applying graduation	236
V. Intellectual property	239
1. Relationship between IP protection and economic growth	239
2. Applying graduation	241
3. Other concerns	243
a) Technology transfer	243
b) Traditional knowledge and genetic resources	245
D. The significance of effective aid for trade	247

Chapter 9: Conclusion	251
Chapter 10: Deutsche Zusammenfassung	255
A. Einleitung	255
B. Handel und Entwicklung	255
C. Die Vorzugsbehandlung der Entwicklungsländer im GATT/WTO-System.....	257
D. Die Sonder- und Vorzugsbehandlung der Entwicklungsländer in einzelnen WTO-Abkommen	260
I. Warenhandel.....	260
1. GATT	260
2. Agrarabkommen.....	261
3. SPS-Abkommen.....	262
4. TBT-Abkommen	262
5. Abkommen über die Zollwertbestimmung	263
6. SCM-Abkommen	263
7. Anti-Dumping-Abkommen.....	263
8. Abkommen über Schutzmaßnahmen	264
9. Abkommen über handelsbezogene Investitionsmaßnahmen	264
II. Dienstleistungshandel	264
III. Handelsbezogene Aspekte der Rechte des geistigen Eigentums.....	265
IV. Streitbeilegung.....	266
E. Reform der Vorzugsbehandlung der Entwicklungsländer	266
I. Differenzierung und Graduation	266
II. Marktzugang unter WTO-Abkommen	268
1. Warenhandel.....	268
2. Dienstleistungshandel.....	269
III. Harmonisierung und nationale Regulierung unter WTO-Abkommen.....	270
1. Zusammenfassung bestehender Reformvorschläge	270
2. Anwendung einer länderbezogenen Differenzierung auf Basis eines abkommensspezifischen Graduationsmechanismus in einzelnen Bereichen.....	272
a) Harmonisierung von Standards.....	272
b) Industrielle Entwicklung, Exportförderung und ländliche Entwicklung.....	273
c) Handelspolitische Schutzinstrumente	275
d) Schutz des geistigen Eigentums.....	276
3. Die Bedeutung effektiver technischer Unterstützung.....	277

Table of Contents

F. Schlussgedanken	278
Bibliography	281

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 controversies 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.

Europäisches und Internationales Recht

herausgegeben von

Prof. Dr. Georg Nolte und Prof. Dr. Rudolf Streinz

Humboldt-Universität zu Berlin und Ludwig-Maximilians-Universität München

begründet von

Prof. Dr. Bruno Simma

unter dem Titel Europarecht–Völkerrecht

Band 73: 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
2010 · 330 Seiten · ISBN 978-3-8316-0975-8

Band 72: Florian Prill: **Präventivhaft zur Terrorismusbekämpfung**
2010 · 506 Seiten · ISBN 978-3-8316-0940-6

Band 71: Martin Kober: **Der Grundrechtsschutz in der Europäischen Union** · Bestandsaufnahme, Konkretisierung und Ansätze zur Weiterentwicklung der europäischen Grundrechtsdogmatik anhand der Charta der Grundrechte der Europäischen Union
2009 · 360 Seiten · ISBN 978-3-8316-0821-8

Band 70: Peter Neusüß: **Legislative Maßnahmen des UN-Sicherheitsrates im Kampf gegen den internationalen Terrorismus** · Eine Untersuchung des Inhalts und der Rechtmäßigkeit von Resolution 1373 unter besonderer Berücksichtigung der Reaktionen der Staaten
2008 · 430 Seiten · ISBN 978-3-8316-0794-5

Band 69: Thomas Meerpohl: **Individualsanktionen des Sicherheitsrates der Vereinten Nationen** · Das Sanktionsregime gegen die Taliban und Al-Qaida vor dem Hintergrund des Rechts der VN und der Menschenrechte
2008 · 356 Seiten · ISBN 978-3-8316-0769-3

Band 68: Dirk Monheim: **Sportlerrechte und Sportgerichte im Lichte des Rechtsstaatsprinzips – auf dem Weg zu einem Bundessportgericht**
2006 · 472 Seiten · ISBN 978-3-8316-0654-2

Band 67: Seyda Dilek Emek: **Parteiverbote und Europäische Menschenrechtskonvention** · Die Entwicklung europäischer Parteiverbotsstandards nach Art. 11 Abs. 2 EMRK unter besonderer Berücksichtigung des deutschen und türkischen Parteienrechts
2006 · 372 Seiten · ISBN 978-3-8316-0648-1

Band 66: Carsten Meier: **ALCA** · Stand und Perspektiven panamerikanischer Integration unter besonderer Berücksichtigung der Subregionen und der Konformität mit dem Welthandelssystem
2006 · 440 Seiten · ISBN 978-3-8316-0645-0

Band 65: Britta Radke: **Autonome Harmonisierung des Gemeinschaftsrechts**

2006 · 276 Seiten · ISBN 978-3-8316-0626-9

Band 64: Claus Richter: **Aspekte der universellen Geltung der Menschenrechte und der Herausbildung von
Völker gewohnheitsrecht**

2007 · 560 Seiten · ISBN 978-3-8316-0592-7

Band 63: Martina Wind: **Der Lieferanten- und Herstellerregress im deutsch-italienischen Rechtsverkehr**

2006 · 436 Seiten · ISBN 978-3-8316-0570-5

Band 62: Oliver Bär: **Freiheit und Pluralität der Medien nach der Charta der Grundrechte der Europäischen
Union**

2005 · 364 Seiten · ISBN 978-3-8316-0530-9

Erhältlich im Buchhandel oder direkt beim Verlag:

Herbert Utz Verlag GmbH, München

089-277791-00 · info@utzverlag.de

Gesamtverzeichnis mit mehr als 3000 lieferbaren Titeln: www.utzverlag.de