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# The Case for Giving Effectiveness to GATT/WTO Rules on Developing Countries and LDCs

Gustavo OLIVARES*

## I. INTRODUCTION

The ongoing comprehensive and integrated Plan of Action leading to a further integration of the Least-Developed Countries (LDCs) into the multilateral trading system can be seen as one of the major co-operation efforts undertaken by the international community for the alleviation of poverty. It encompasses strong commitments for collaboration and goodwill by the main international agencies, economic organisations, donors and the beneficiaries themselves. In that sense, there cannot be negative comments as to the substance and value of the global Plan of Action and the joint work programmed under it such as the "Integrated Framework"[1] and the "Mainstreaming"[2] schemes. However, this process should not be over-emphasised. It is of fundamental importance that "less-developed countries" (developing countries and LDCs) should not be dismayed in their own attempts to find out alternatives, new schemes and solutions.

Topics which are not included in the Plan of Action comprise the legal nature and current status of the General Agreement on Tariffs and Trade (GATT)/World Trade Organization (WTO) set of provisions on developing countries and LDCs, as well as its legal and systemic effects on the multilateral trading system. Is this set of legal provisions, as it stands today, really benefiting the poor Members of the WTO as it was originally intended?

This article argues that maintaining the current trend of "soft law" status for GATT/WTO provisions on "less-developed countries" is *prima facie* procedurally discriminatory,[3] since they disqualify developing countries and LDCs from resorting, effectively, to the

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[1] It is the follow-up of the Plan of Action. The Integrated Framework's main objective is "to increase the benefits that LDCs derive from trade-related technical assistance made available to them by the six agencies involved" in the programme (World Trade Organization, United Nations Conference on Trade and Development, International Trade Commission, International Monetary Fund, World Bank and United Nations Development Programme). It intends "to assist LDCs respond to market demands and accelerate their integration into the multilateral trading system": see Doc. WT/LDC/SWG/IF/1, 29 June 2000, p. 10.

[2] Basically, "[m]ainstreaming (*integrating*) trade involves the process and methods of identifying and integrating trade priority areas of action into the overall framework of country development plans and poverty reduction strategies": see Doc. WT/LDC/SWG/IF/9/Rev.1, 17 January 2001, p. 1.

[3] The adverse legal effect of this new type of unforeseen discriminatory development is that it places "less-developed" Members at a disadvantage inside the WTO legal system, in terms of access to its dispute settlement machinery.

WTO dispute settlement system. Instead, they put them, from the outset, in a disadvantaged position inside the system, thereby nullifying almost all the potential benefits accruing to them from preferential and non-reciprocal trade arrangements.

## II. The Main GATT/WTO Legal Instruments and Processes Relating to Developing Countries and LDCs

Most of the legal instruments of GATT relating to "less-developed countries", referred to in this article as a set of rules, were carried over from GATT 1947 when the WTO came into existence. Subsequently, the WTO has also produced some instruments. As a result, the totality of measures in the WTO legal system is as follows:

- Article XVII, and Part IV of GATT 1947 (Articles XXXVI, XXXVII, and XXXVIII).
- The Generalized System of Preferences (GSP) schemes.
- The Decision on Differential and more Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (the "Enabling Clause").
- The special and differential treatment (S&DT) provisions in the Uruguay Round Agreements.
- The WTO Ministerial Decision on Measures in Favour of LDCs.
- The WTO Plan of Action for the LDCs.
- The follow-up programme on the High-Level Meeting on LDCs, and its Integrated Framework and Mainstreaming schemes.
- The WTO Decision on Waiver for Preferential Tariff Treatment of LDCs.

The WTO Secretariat has classified[4] the whole range of these provisions into several types:

(i) provisions aimed at increasing the trade opportunities of developing country WTO Members;
(ii) provisions under which WTO Members should safeguard the interests of developing country Members;
(iii) flexibility of commitments, of action, and use of policy instruments;
(iv) transitional time periods;
(v) technical assistance; and
(vi) provisions relating to least-developed country Members.

The same report further verifies that:

> "[t]he universe of special and differential treatment consist of 145 provisions spread across the different Multilateral Agreements on Trade in Goods; the General Agreement on Trade in Services; the Agreement on Trade-Related Aspects of Intellectual Property; the Understanding on Rules and Procedures Governing the Settlement of Disputes; and various Ministerial

[4] WTO Secretariat Note on *Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions*, Doc. WT/COMDT/W/77, 25 October 2000, p. 3.

Decisions. Of the 145 provisions, 107 were adopted at the conclusion of the Uruguay Round, and 22 apply to least-developed country Members only."

## III. THE LEGAL NATURE OF THE GATT/WTO RULES AND SPECIFIC INSTRUMENTS RELATING TO DEVELOPING COUNTRIES AND LDCS: A SET OF "SOFT LAW" RULES

Under the WTO legal system one of the most striking features of the provisions relating to developing countries and LDCs is that they basically contain "best endeavour", "remarkably vague and aspirational in approach",[5] "soft law" rules. This means that, although they may clearly establish a set of positive principles and objectives for implementation, as well as rights and obligations, almost all of these legal provisions are "loose" and "unenforceable, as they are expressed in imprecise and hortatory language",[6] in relation to the WTO integrated dispute settlement mechanism.

Commentators often quote Article XXXVII of GATT 1947 as an example of a non-enforceable commitment: "The developed contracting parties shall to the fullest extent possible ... accord high priority to ...". The language used in the legal texts relating to developing countries and LDCs is generally the same: "shall be facilitated through negotiated specific commitments", "shall take account of the special needs", "agree to facilitate", "agree to ensure", "shall consider", "sympathetic consideration shall be given", and so forth and so on.

This trend reflects the traditional trade policy approach and practice by developed country Members on the issue of the GATT/WTO set of legal provisions for developing countries and LDCs, as it has been repeatedly confirmed in various panel proceedings, and by the high records of non-compliance with the old GATT dispute settlement rulings. For instance, in the *EC—Refunds on Exports of Sugar—Complaint by Brazil* case, the EC representative "argued that the provisions of Article XXXVI constituted principles and objectives and could not be understood to establish precise, specific obligations. It was therefore not possible by definition to ascertain that these principles had been infringed through the application of any specific measure".[7] Likewise, in the *EEC—Restrictions on Imports of Apples—Complaint by Chile* case, in relation to the objectives and commitments embodied in Articles XXXVI and XXXVII, in particular XXXVII:1(b), the Panel "could not determine that the EEC had not made serious efforts to avoid taking protective measures against Chile. Therefore the Panel did not conclude that the EEC was in breach of its obligations under Part IV".[8]

[5] See John H. Jackson, *The World Trading System* (MIT Press, Cambridge, Mass., 1997) 2nd edn, p. 319.

[6] See Edwini Kessie, *Enforceability of the Legal Provisions Relating to Special and Differential Treatment under the WTO Agreements*, The Journal of World Intellectual Property, Vol. 3, No. 6, November 2000, pp. 955–975.

[7] L/5011–27S/69, Report of the Panel adopted on 10 November 1980, para. 2.28, p. 13.

The "soft law" language used may, to a certain extent, be justified under the GATT *à la carte* trading regime, given the power-based and non-enforceable character of the system itself. However, this trend has inexplicably and paradoxically continued after the creation of the WTO, even though this is a rules-based system, in which the legal effect of the rights and obligations placed on its Members are of mandatory character, and enforceable through the dispute settlement mechanism set up specifically with the intention to provide effectiveness, predictability and security to the system.

In the broader field of public international law, the singularity of "soft law" is described by Professor Dupuy as "part of the contemporary law-making process but, as a social phenomenon, it evidently overflows the classical and familiar legal categories by which scholars usually describe and explain both the creation and the legal authority of international norms. In other words, *soft* law is a trouble maker because it is either not yet or not only law".[9] In 1972 Professor Weil, referring to "the rule of international economic law", took the view that it was "characterised by a great malleability, as much in its immediate contents as in its future significance: to the point that one would be apt to readily speak of a non-compelling legal norm".[10] By 1979, Professor Seidl-Hohenveldern in his course delivered to The Hague Academy of International Law concluded that "soft law" rules governing the field of international economic relations "cannot solve international problems between States".[11] Later on, in 1983, based on the report submitted by Professor Michel Virally, the *Institut de droit international* adopted a Resolution, at its Cambridge session, that considered "soft law" nevertheless law and that its violation entailed the same legal consequences as any other legal obligation. It further stated that both "soft" legal obligations and purely political commitments are subject to the general obligation of good faith, which governs the conduct of subjects of international law, and that the legal or purely political character of a commitment set forth in an international text depends upon the intention of the parties.[12] Thus, it seems that most of the legal analysis and studies carried out regarding the nature and effect of the "soft law" regulations have recognised that they are merely statements of "the law that should be", creating, at the most, weak legal obligations and commitments.

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[8] L/5047–27S/98, Report of the Panel adopted on 10 November 1980, para. 4.23, p. 15. For more examples relating to the practice of the provisions of Part V, Trade and Development, cf. WTO Secretariat, *Guide to GATT Law and Practice, Vol. 2, Articles XXII–XXXVIII*, Geneva, 1995, pp. 1039–1070.

[9] See Pierre-Marie Dupuy, *Soft Law and the International Law of the Environment*, Michigan Journal of International Law, Vol. 12, No. 2, Winter 1991, p. 420.

[10] See Prosper Weil, *Le droit international économique: mythe ou réalité?*, in Société française pour le droit international, *Aspects du droit international économique, élaboration, contrôle, sanction* (Colloque d'Orléans, 25, 26, et 27 mai 1971), Pedone, Paris, 1972, p. 6. Professor Dupuy also confirmed the view that "international economic law and international law relating to the protection of the human environment are areas in which new *soft* regulations have emerged in predominant fashion": see Pierre-Marie Dupuy, as note 9, above, p. 421.

[11] See Ignaz Seidl-Hohenveldern, *International Economic Soft Law*, Recueil de cours de l'Academie de droit international, 1979 II, Tome 163, p. 225.

[12] See *Annuaire de l'Institut de droit international*, 24 August–1 September 1983, Vol. 60, Part II, pp. 287–291; see also *Annuaire français de droit international*, 1983, pp. 1202–103.

## IV. The Legal Status of the GATT/WTO Provisions on Developing Countries and LDCs: A Regime of Exception as Long as Partners Remain Unequal

Under the GATT legal regime, the old debate as to whether one should allow, within that system, a regime of most-favoured-nation (MFN) exceptions conferring benefits to less-developed countries, must be basically placed within the context of the Cold War. Here, the developed countries accepted the existence of a temporary regime of exceptions conditioned on the retention of a discretion[13] as to the granting of the benefits, because of the Cold War tensions which determined international economic and trading relations between governments. Furthermore, the period following the Second World War was characterised by an escalation in the North-South conflict regarding the protection of foreign investment and the supply of vitally needed raw materials.[14] In this wider context, ensuring the control of the benefits that were to be granted was crucial for the industrialised countries, and this explained to a large extent why the concessions were flawed and took the form of "soft law" rules.

Given that the present trading system is not the old fragmented one, but is legally integrated,[15] is based on the rule of law and not on the rule of power, has generated its own dynamics, and where the conviction exists today that there are "global common concerns", the old debate must be overcome since there are no longer valid reasons for preserving "soft law" rules under the present "hard" legal system. Today, the priority "number one" for the survival of the system is to bridge, as soon as possible, the widening gap between the poor and the rich Members. And this can only be achieved through the recognition that the WTO trading system is intended to be a means for creating real equal players and for securing developing countries and LDCs "a share in the growth in international trade".[16] For this to become a reality there is a need for the system to start upgrading "loose commitments" into fully "binding" and "enforceable" ones.

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[13] "Under GSP each developed country could choose the countries to be favoured, the commodities to be covered, the extent and the period of application of tariff preferences to be granted. As another distinguished legal scholar, Kenneth Dam, pointed out thirty years ago, inclusion of Part IV achieved little by way of precise commitments but a lot in terms of verbiage", as quoted by T.N. Srinivasan, *Developing Countries in the World Trading System: From GATT, 1947, to the Third Ministerial Meeting of WTO, 1999*, The World Economy, Vol. 22, No. 8, November 1999, p. 1051.

[14] Nationalisations, expropriations, and seizing of foreign assets soared.

[15] The WTO trading system is "integrated" because, among other reasons, (i) the "Multilateral Trade Agreements" are an "integral part" of the WTO Agreement "binding on all Members" (Art. II, para. 2 of the WTO Agreement); (ii) the WTO covers and completes the regulation of "international movements of goods, services, persons, capital and related payments in an integrated manner" (see Ernst-Ulrich Petersmann, *The GATT/WTO Dispute Settlement System, International Law, International Organizations and Dispute Settlement*, Kluwer Law International, The Hague, 1997, p. 45); (iii) the WTO functions as "the executive", "the legislative" and "the judicial" power for the same unity; and (iv) the "WTO law" is seen as "largely self-contained", if not "entirely self-contained".

[16] See the Preamble of the WTO Agreement, GATT/WTO Secretariat, *The Results of the Uruguay Round of Multilateral Trade Negotiations, The Legal Texts*, WTO, Geneva, 1995, p. 6.

For the same reasons noted above, it is conceivable that a WTO regime of MFN exceptions conferring fully binding and enforceable benefits to developing countries and LDCs shall exist as long as partners remain unequal.

## V. Some Negative Effects of the "Soft Law" Character of the GATT/WTO Provisions on Developing Countries and LDCs

From the systemic viewpoint, it is paradoxical that while the entire GATT legal regime of "soft law" rules has upgraded to "hard law" status, by virtue of the creation of a legally enforceable mechanism (the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)),[17] the set of GATT "soft" legal provisions granting benefits to developing countries and LDCs has not been upgraded, but instead continues to be treated and envisioned in the same manner as in the old days of the GATT "soft law" trading-type regime.

Regarding the subjects of the rights and obligations, i.e., the recipient-Members under the old GATT system and the new WTO system, it would appear that by virtue of the upgrading operation (from "soft law" to "hard law" rules), the weaker Members of yesterday are today even more vulnerable than before, because the rules conferring benefits to them, the purportedly GATT "equalising rules", have not been upgraded to a "hard" status. This has had the effect of increasing legal inequality between already materially unequal subjects of the same legal system. This, obviously, constitutes a major imbalance inside a system, which is essentially rules-based. In turn, it raises serious problems as to the application of the general principle of equality before the law, inherent to any legal and dispute settlement systems.

As to the WTO dispute settlement system, there are a significant number of "procedural" provisions favouring recourse to the DSU by developing countries and LDCs. As a result of the general strengthening of the WTO dispute settlement mechanism, there is also an increase in the frequency of its use by developing countries.[18] However, in relation to the protection of their "preferential", and "special and differential" rights, these "procedural" provisions have been of little help. Developing countries continue to claim that a number of these provisions are flawed, and that there is no way to ensure that special and differential treatment is accorded in practice.[19] The overall effect of this is that it inhibits and impairs less-developed

[17] According to Art. 2, para. 2 of the DSU, "[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system".

[18] See, for instance, Ernst-Ulrich Petersmann, as note 15, above, p. 202. It seems, nevertheless, that there is a lack of use of the WTO dispute settlement mechanism by LDCs, and this fact has been, to some extent, attributed to the dependence on official assistance and the fear of reprisals.

[19] During the preparatory process for the 1999 Seattle Ministerial Conference Cuba, Dominican Republic, Egypt, El Salvador, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka and Uganda proposed that "[a]ll s&dt provisions shall be converted into concrete commitments": see Doc. WT/GC/W/354, 11 October 1999, p. 5. Additionally, Kenya proposed that s&dt provisions should be made a "permanent feature", and Cuba requested the establishment of "an institutional body to follow up and guarantee effective implementation of special and differential treatment": see Doc. WT/GC/W/233, 5 July 1999, p. 6 and Doc. WT/GC/W/388, 15 November 1999, p. 2, respectively.

countries, in particular LDCs, potential for making full use of the panoply of dispute settlement options for solving trade conflicts. Moreover, given that full capacity to resort to dispute settlement procedures is often viewed by the international private sector as a powerful asset for ensuring compliance with trading commitments, international investors would not be encouraged to invest, principally, in LDC Members, because of their inherent, at least partial if not total, inability to ensure compliance with specific WTO trading rules and commitments such as, for instance, preferential market access commitments. Another effect is that it also diminishes their trade "negotiating power".

Concerning market access, recourse to policies of preferential access to markets may prove helpful only if commitments are "binding and enforceable".[20] As indicated above, "soft law" commitments in market access will not permit developing countries and LDCs to fully exercise the defence of their rights and legitimate expectations under the WTO agreements, and will inhibit them from resorting to the WTO dispute settlement mechanism in the eventuality of a breach of their preferential rights, because the "soft law" wording of this set of provisions nullifies, *ab initio*, all the benefits it is supposed to confer.

## VI. Conclusion

The set of GATT/WTO legal provisions purported to confer benefits to developing countries and LDCs contains a "birth defect": they are, on the whole, a set of "soft law" rules. The non-binding and non-enforceable "soft law" nature of these rules explain to a large extent why they keep a "poor track record" as to their effectiveness in implementation. Thus, the proposals for dismantling them, because of the "poor track record", are without any legal and real basis since the *causa causans* lies not in the failure of their implementation, but in the nullifying effect of these rules. As a consequence of this, developing country Members, in particular LDCs, are put at a considerable disadvantage inside that system, because of the "legal inequality" brought by the nullifying effect of the "soft law" rules. This negative trend generated by the GATT "soft" decision-making process, with respect to "preferential rules" for developing countries and LDCs, has not been corrected or progressively remedied with the entry into force of the WTO Agreement—the "hard" legal system. Given that the latter is an efficient and reliable functional system, it is hoped that a positive change will take place as a matter of urgent need.

[20] See Murray Gibbs, *The Positive Agenda and the Seattle Conference*, in United Nations Conference on Trade and Development, *Positive Agenda and Future Trade Negotiations*, United Nations, New York and Geneva, 2000, p. 8.

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