THE PREFERENTIAL STATUS OF DEVELOPING COUNTRIES IN INTERNATIONAL TRADE LAW AFTER THE URUGUAY ROUND

W. D. Verwey*

ABSTRAK

Strategi pembangunan yang dicanangkan PBB, menyatakan bahwa pembangunan adalah hak asasi suatu bangsa dan hak asasi seseorang sebagai anggota masyarakat. Formulasi hak membangun akan rapuh apabila pelaksanaannya tidak dinyatakan secara bersama-sama dengan pelaksanaan tanggung jawab masyarakat internasional secara menyeluruh. Pembangunan hukum ekonomi internasional dalam usaha mewujudkan NIEO adalah sebanding dengan pembangunan hukum nasional di bidang sosial dan ekonomi, terutama ketika dilangsungkannya pembangunan industrialisasi oleh bangsa Eropa dalam abad ini. Dalam tiga dekade, kita dapat mengamati pembangunan hukum dalam tingkat internasional, yaitu:

1. Asas kebebasan pada negara-negara maju yang telah menggunakan atau menyalahgunakan kekuatan ekonominya.
2. Asas persamaan di hadapan hukum.
3. Asas timbal balik yang cocok untuk konsolidasi kekuatan yang dominan dan memaksa terhadap negara-negara Dunia Ketiga yang patuh pada kepentingannya.

Key Words: International Trade Law, Status of Developing Countries.

I. INTRODUCTION

Since the introduction of the U.N. Development Decades strategy (G.A. Res., 1970: 12626 (XXV) Comp. G.A. Res., 35/56 Comp, G. A. Res., 45/199), the word 'development' has become endowed with legal significance. A particular aspect of this evolvement is the proclamation of development as a right of both nations and individual human beings under international law: On many occasion, the UN Commission on Human Rights and the UN General Assembly, among others, have reiterated "that the right to development is a human right and that equality of opportunity for development is as much a prerogative of nations as of individuals within nations" (UN. Res., 1977: 4 (XXIII) Comp. G.A Res., 1986: 41/128). The ultimate objective of development has been described as aiming "to bring

* Professor at National University of Groningen, the Netherlands.

about sustained improvement in the well-being of the individual and bestow benefits on all " (G.A.Res., 1970: 2626 (XXV).

The formulation of such a right would, however, remain a rather empty shell, if its implementation had not at the same time been declared to constitute a common responsibility of the international community as a whole: In an increasingly interdependent world, the pursuit of economic progress and prosperity can no longer be realized primarily by the several economic policies of individual governments alone, but has to be supported by the effectiveness of co-ordination of policies and cooperation among governments. The major post-World War II changes on the global economic scene have, as the UN Declaration on the Establishment of a New International Economic Order (NIEO Declaration) significantly observes, "thrust into prominence the reality of interdependence of all the members of the world community. Current events have brought into sharp focus the realization that the interests of the developed countries and the interests of the developing countries can no longer be isolated from each other; that there is a close interrelationship between the prosperity of the developed countries and the growth and development of the developing countries, and that the prosperity of the international community as a whole depends on the prosperity of its constituent parts (G.A. Res.,1974: 3201 Comp. Waart, 1992).

The implementation of the right to development within the framework of a new world economic order must, accordingly, be a common resolve. More than sixty years ago, "any war, or threat of war, whether immediately affecting any of the Members of the League [of Nations] or not" was "declared a matter of concern to the whole League" (U.N. Covenant.,Art.11). In the United Nations era, one has agreed that not only war but also poverty, wherever it occurs, shall be a matter of concern to the whole United Nations; and that, both within and outside the UN, all Member states bear responsibility for its elimination. At the very first session of UNCTAD in 1964 already it was agreed, indeed, that "all countries pledge themselves to pursue internal and external economic policies designed to accelerate economic growth throughout the world, and in particular to help promote, in developing countries, a rate of growth consistent with the need to bring about a substantial and steady increase in average income, in order to narrow the gap between the standard of living in developing countries and that in the developed ones" (UNCTAD, IV). Subsequently, when the UN Members had soon thereafter "solemnly proclaimed" their "united determination to work urgently for the establishment of a new internal

economic order," and adopted the 'set of NIEO Resolutions' spelling out the basic principles of a NIEO in 1974 (G.A.Res., 1974: 3201 Comp. G.A.Res.,1976:31/178) the Assembly affirmed "that its resolutions on the establishment of a new international economic order reflect a commitment on the part of all countries to ensure equitable economic relations between developed and developing countries and a deliberate, sustained and planned effort to contribute to the development of the developing countries" (G.A. Res. 1976:31/178).

The common recognition of this responsibility has during the past three decades contributed to gradually changing the foundations of public international economic law: Formerly being a field of law typically based upon the concept of liberalism and departing from the fundamentals of freedom, legal equality and reciprocity - as expressed, respectively, in, for instance, the principles of the freedom of the seas, most-favoured-nation treatment in international trade law, and prompt, adequate and effective compensation for nationalisation of foreign property in international investment law - it has recently also become marked by the twin concept of co-operation and solidarity. This concept reflects common recognition of the fact that of in an increasingly interdependent world economic prosperity is indeed ultimately indivisible and that the existing welfare gap between "developed" and "developing" nations will eventually turn out to be incompatible with sustainable prosperity also for the developed ones (Dordrecht,1981). Thus, the concept of co-operation and solidarity constitutes the very cornerstone of what the Charter of Economic Rights and Duties of States (CERDS) refers to as "collective economic security for development" (G.A. Res., 3281). In its turn, the acceptance of this concept incited the implicit recognition of three new fundamentals, together conducive to confining the welfare gap-perpetuating impact of the three aforementioned "liberal" principles: protection of the economic interests of developing countries; positive discrimination in favour of developing countries; and non-reciprocity in the relationships between developed and developing countries.

Developments in public international economic law during the times of "the effort to establish a NIEO" are comparable to developments in national social and economic security law initiated by the industrializing states of Europe around the turn of this century. In those days, social and economic legislation was enacted to put an end to the misery of the masses of labourers which up till then had been entirely at the mercy of entrepreneurs, who were legally free to pursue maximum profits at the

formers" expense. Then, law began to intervene with a view to eliminate the most detrimental aspects of a non-social free market system, marked by features like unrestricted children's labour, lack of payment in case of illness, sixteen hours working days for starvation wages, physically destructive women's labour, etc.; which soon contributed to a gradual improvement of working conditions and living standards. This was achieved, on the one hand, by putting limits to entrepreneurial freedom vis-a-vis the masses of labourers and, on the other, by endowing the latter with specific protective entitlements and rights. Ultimately, the ensuing social and economic security legislation turned out to result in advantages for both sides. In one of his famous works, Gunnar Myrdal has emphasized the importance of socio-economic reform as a condition for economic progress in the Western Nations, pointing at the need of "harmony of interests. But it has been a 'created harmony', reached by not letting the play of the market forces unfold themselves unhampered, but by regulating them and harnessing them to serve common interests to which belongs protecting and advancing the lagging regions and groups of people .... (T)he developed countries are now developed and politically consolidated partly because, throughout their recent history, they have interfered in the play of the market forces and framed policies that counteracted and corrected the adverse effects of those forces"(Myrdal, 1970: 196-197, 194).

During the past three decades, to a certain extent, we can observe a comparable legal development at the international level: The principles of freedom for developed countries to (ab)use their economic power positions, and equality before the law, and reciprocity, which are conducive to the consolidation of dominant positions and to keeping Third World countries subservient to their interests, have increasingly become challenged by newly adopted and evolving principles and rules of international law aimed at protecting the economic interests of and improving living standards in the Third World, and at supporting the effort to narrow the welfare gap. If the common resolve to establish an equitable NIEO ever was to be sincere, the twin principles of *liberte et egalite* had to be supplemented, and to a certain extent controlled, this time at the international level, by the principle of *fraternity;* so as to ensure that need, next to power, should provide a legal basis for entitlement (Schachter,1976:1). This indeed is the essential message expressed by the set of NIEO Resolutions (G.A. Res., 3201).

II. THE PRINCIPLE OF PREFERENTIAL TREATMENT FOR DEVELOPING COUNTRIES AS A HERITAGE OF THE NIEO RESOLUTIONS

Among the ten-odd principles which can be derived from the numerous provisions of the NIEO Resolutions, four have been further concretized and found substantial implementation in the practice of states and relevant Inter-Governmental Organizations (IGO's): (1) The principle of financial and technical assistance to developing countries (in the practice of, e.g. the development co-operation system of the UN and the Specialized Agencies) (Verwey, 1993: 93-118); (2) the principle of permanent sovereignty over natural wealth and resources (notably in the practice of states and the ICSID with respect to the treatment foreign investment) (Schrijver, 1995); (3) the principle of common heritage of mankind (notably in the practice of the UN General Assembly and the Third UN Conference on the Law of the Sea) (Verwey, 1993:93-118); and (4) the principle of preferential treatment for developing countries and particularly needy sub-groups among them (Verwey,1982: 6-183).

The principle of preferential treatment is expressed in the NIEO resolutions in the following wording: "Preferential and non-reciprocal treatment for developing countries wherever feasible, in all fields of international economic co-operation, wherever feasible" [(sic); NIEO Declaration] (G.A. Res.,3201). "With a view to accelerating the economic growth, of developing countries and bridging the economic gap between developed and developing countries, developed countries should grant generalized preferential, non-reciprocal and non-discriminatory treatment to developing countries in those fields of international economic co-operation where it may be feasible" (CERDS) (G.A. Res., 3281 (XXIX), Art. 19).

It is certainly this principle of preferential treatment for developing countries, the principle derived from the fundamental of positive discrimination, which has found the most widespread and practically most significant implementation in several manifestations of 'hard' law, notably in treaties and binding decisions of relevant IGO's, in various fields of public international economic law; ranging from the law of the sea, through environment protection law as well as financial and monetary law to international trade law (Verwey,1982: 60183). This principle has even, probably more so than any other NIEO principle, survived the gradual decline and eventual elimination of the NIEO as a legally relevant concept: When it became increasingly recognized, during the late seventies and early

eighties, that a NIEO as a comprehensive policy objective could not be realized by Means of large-scale strategies, and consequently the international community returned to a step-by-step approach, the principle of preferential treatment for developing countries continued to be implemented in the practice of states and IGO's. This holds even - and notwithstanding the contrary pressure excreted by major industrialized nations, which desired to get rid of preferential schemes - in the field of, international trade when the system of international trade law was thoroughly revised during the Uruguay Round of negotiations which resulted in the establishment of the World Trade Organization (WTO). It may indeed be considered as one of the most spectacular outcomes of the Uruguay Round that the principle of preferential treatment for developing countries was reinforced rather than abandoned.

The correctness of this conclusion is not adversely affected by the increasing application in the practice of many IGO's of the principle of "graduation". According to this principle any kind or modality of preferential entitlement should correspond to *individual* states' needs; in other words, as soon as the economic development of a developing country has reached a level at which specific preferential entitlements are no longer needed, such entitlements should no longer be granted. Adherence to this principle - which during the past decades has resulted in the recognition of numerous preferential rights and other entitlements for developing countries and particularly needy sub-groups among them (like the "least developed," "poorest," "low income," "food priority" and "geographically disadvantaged" countries) (Dordrecht, 1986; 189-216) - has reconfirmed and reinforced, rather than weakened, the implementation and status of the preferential treatment principle. In the field of international trade law, for GATT purposes the principle of graduation has been circumscribed as follows: "The concessions and obligations made and the obligations assumed by developed and less-developed contracting parties under the provisions of the General Agreement should promote the basic objectives of the Agreement, including those embodied in the Preamble and in Article XXXVI. Less-developed contracting parties expect that their capacity to make contributions or negotiated concessions or take other mutually agreed action under the provisions and procedures of the General Agreement would improve with the progressive development of their economies and improvement in their trade situation and they would accordingly expect to participate more fully in the framework of rights and obligations under the General Agreement. ... The developed countries do not expect reciprocity

for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to trade of developing countries, i.e. the developed countries do not expect the developing countries, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs. Developed contracting parties shall therefore not seek, neither shall less-developed contracting parties be required to make, concessions that are inconsistent with the latters' development, financial and trade needs" (Dec. 1979: L / 4903).

The analysis of the results of the Uruguay Round presented below reflects the degree to which the principle of preferential treatment has survived in the course of negotiations, despite the initial intention of leading developed states to eliminate it from the legal scene in and around the GATT as part of the new legal system of the WTO.

III. THE BODY OF GLOBAL INTERNATIONAL TRADE LAW OFTER THE URUGUAY ROUND

Since the adoption, on 15 April 1994, of the Marrakesh Agreement Establishing the World Trade Organization the revised global system of international trade law comprises, next to this Agreement which embodies the Constitution of the WTO, the revised General Agreement on Tariffs and Trade, (GATT 1994, including the Marrakesh Protocol to the GATT and six interpretative Understandings); twelve supplementary agreements (dealing with the following special issues: agriculture, application of sanitary and phytosanitary measures, textiles and clothing, technical barriers to trade, trade-related investment measures (TRIM's), implementation of Article VI, Implementation of Article VII, preshipment inspection, rules of origin, import licensing procedures, subsidies and countervailing measures, and safeguards); the General Agreement on Trade in Services (GATS); the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIP's); the Understanding on Rules and Procedures Governing the Settlement of Disputes; the Trade Policy Review Mechanism (TPRM); the Agreement on Trade in Civil Aircraft; the Agreement on Government Procurement; the International Dairy Agreement; the International Bovine Meat Agreement; the schedules of Tariff Concessions; the sets of Services Commitments; the Understanding on Commitments in Financial Services; and, next to the numerous decisions taken during previous negotiation rounds, in particular the Tokyo Round, twenty-seven binding Decisions and Declarations adopted by the Trade Negotiations Committee in December

1993 (ranging from decisions on measures concerning least developed countries, through maritime transport and services, to the relationship between trade and the environment.

Many of these aforementioned documents embody preferential treatment provisions, far too many to be all dealt with within the framework of the present contribution to this volume. Hence, a representative selection has been made. In this connection, one preliminary observation must be made: The international trade law system after the conclusion of the Uruguay Round embodies a wide scale of different kinds and modalities of preferential entitlements for developing countries (and sub-groups like 'the least-developed countries' and 'net food-importing countries'), ranging from full-fledged subjective rights down to questionable entitlements which could hardly be stigmatized as legally relevant privileges. For instance, the Uruguay documents embody numerous provisions stipulating no more than a (political rather than legal) instruction that the developed country Members "should take into account the special interests of developing contracting parties" in the course of implementing the agreement or decision in question. Such abstract, vague commitments could certainly not be interpreted as providing developing countries with a real legal right. Taking this into consideration, the present author has identified twelve different kinds of preferential entitlements, of which only one category could be held to endow developing countries with full, unconditional, directly implementable, subjective preferential rights. The various kinds of preferential entitlements can be catalogued according to the following gliding scale:

(1) Full subjective preferential rights.
(2) Subjective preferential rights whose implementability depends on the occurrence of a specific future event.
(3) Subjective preferential rights whose implementability depends on the subsequent identification of secondary terms or conditions.
(4) Specific preferential entitlements whose implementability is uncertain to the extent that developed country Members are merely committed to pursue their implementation as far as they consider this practicable.
(5) Specific preferential entitlements whose implementability is even more uncertain to the extent that developed country Members are merely required to facilitate or promote the desired result.
(6) Abstract preferential entitlements whose implementability is doubtful as a result of the circumstance that the preferential treatment to be granted is not specified.

(7) Abstract preferential entitlements whose, implementability is further limited by the provision that the preferential treatment to be granted must first be agreed upon "on mutually agreed terms".

(8) Preferential entitlements whose implementability can hardly be ensured as a result of the provision that the treatment in question will be granted to developing countries "in particular".

(9) Preferential entitlements whose implemeiitability is not at all ensured as a result of the provision that developed country Members merely should - in stead of 'shall' - grant the treatment required.

(10) Preferential entitlements whose implementability cannot be ensured as a result of the provision that developed country Members are merely entitled, but not obliged, to grant the treatment in question.

(11) Preferential entitlements which merely provide developing countries with the privilege to apply for a specific preferential treatment.

(12) Preferential entitlements whose implementability entirely depends on the interpretation by developed country Members of the stipulation that, in the course of a specific action, they merely "shall take the special interests of developing countries into account".

IV. THE PREFERENTIAL STATUS OF DEVELOPING COUNTRIES OFTER THE URUGUAY ROUND

A. Full Subjective Preferential Rights

An illustrative example of a full-fledged, unconditional and directly implementable, preferential right is the provision, in the Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (the so-called 'Enabling Clause'), that developing country Members have the right to accord differential and more favourable treatment to other developing countries assembled in any "regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs" with respect to products imported from one another (Dec., 1979: L/4903 Comp. BISD, 1980: 203). Developed country members enjoy the right to do this amongst each other only when they have entered into a close scheme of co-operation which at least meets the criteria of a Free-trade Area or Customs Union.

The Agreement on Agriculture provides, among other things, for a system aimed at the gradual reduction of government support for domestic agricultural producers. However, it has been agreed that "government

measures of assistance, whether direct or indirect, to encourage agricultural and rural development are an integral part of the development programmes of developing countries". Therefore, "investment subsidies which are generally available to agriculture in developing country Members and agricultural input subsidies generally available to low-income or resource-poor producers in developing country Members shall be exempt from domestic support reduction commitments that would otherwise be applicable to such measures" (GATT Skretariat,1994:46).

The Agreement on Trade-Related Investment Measures (TRIM's; hereinafter referred to as the Agreement on TRIM's) stipulates that all TRIM's that are not in conformity with the provisions of this Agreement shall be notified, to the Council for Trade in Goods, along with their principal features. While it is provided that developed country Members shall eliminate all such TRIM's within two years of the date of entry into force of the WTO Agreement, developing country Members have the right to do so within a period of five years, and least-developed country Members have the right to do so within seven years (GAAT Secretariat, 1994: 164).

The Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (hereinafter referred to as the Agreement on Art. VII) provides for a scheme of "special and differential treatment" for developing country Members. Among other provisions, this Agreement provides for a typical preferential right, common to many GATT-related instruments, which could aptly be called the "time-limited exception clause". According to this clause, developing country Members enjoy the right to postpone the implementation of certain or all commitments under the Agreement in question for a specified period of time. In this case, developing country Members not party to the previous Agreement on implementation of Article VII of 1979 "may delay application of the provisions of this (1994) Agreement for a period not exceeding five years from the date of entry into force of the WTO Agreement for such Members" (GATT Secretariat, 1994: 209). Similar time-limited exception clauses can be found in the agreement on Agriculture (GATT Secretariat, 1994: 46 and 53) the Agreement on TRIM's (GATT Secretariat, 1994: 164), the Agreement on Subsidies and Countervailing Measures (GATT Secretariat, 1994: 299), the Agreement on Safeguards (GATT Secretariat, 1994: 320), and the Agreement on Trade-Related Aspects of Intellectual Property Rights (Agreement on TRIP's) (GATT Secretariat, 1994:398-399). Likewise, while the Agreement establishing the WTO provides with respect to the least-developed countries that they "will

only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities" (GATT Secretariat, 1994: 15), the Decision on Measures in Favour of Least Developed Countries stipulates that these countries "shall be given additional time of one year from 15 April 1994 to submit their schedules [of commitments and concessions] as required in Article XI of the Agreement Establishing the World Trade Organisation" (GATT Secretariat, 1994: 440).

While the granting of governmental [export and production] subsidies is normally forbidden for developed country Members, the Agreement on Subsidies and Countervailing Measures, while recognizing "that subsidies may play an important role in economic development programmes of developing country Members," provides that the prohibition to grant such governmental subsidies shall not apply to least developed countries and those other developing country Members whose GNP per capita is below $1,000 per annum (GATT Secretariat, 1994: 298-399).

Another specific preferential right arises for developing country Members from the General Agreement on Trade in Services (hereinafter referred to as GATS), where it provides that developed country Members shall, within two years from the date of entry into force of the WTO Agreement, establish contact points for the purpose of facilitating the access of developing country Members' service suppliers to information, related to their respective markets concerning: "(a) commercial and technical aspects of the supply of services; (b) registration, recognition and obtaining of professional qualification; and (c) the availability of services technology" (GATT Secretariat, 1994: 330).

B. Subjective Preferential Rights whose Implementability Depends on the Occurrence of A Specific Future Event

An important example of this kind of specific preferential right is the famous provision of Article XXXVI. par.8 of the GATT, which reads: "The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties" (GATT Secretariat, 1994: 534). While this right as such is formulated in an unconditional manner, it can only be implemented, however, when trade negotiations are held.

Another example of this category of rights is found in the Understanding on Rules and Procedures Governing Settlement of Disputes, which provides, with respect to so-called "Panel Procedures": "Where one or more of the parties [to a dispute in a panel procedure] is a developing country Member, the panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures" (GATT Secretariat, 1994: 415). This privilege arises only, of course, when a developing country Member becomes a party to such a dispute settlement procedure.

C. Subjective Preferential Rights whose Implementability Depends on the Subsequent Identification of Secondary Terms or Conditions

This type of preferential entitlement would have been a full-fledged preferential right had it not been provided that it's implementability depends on the prior determination of terms and conditions to be agreed upon with other parties to the instrument in question. As long as such terms and conditions have not been agreed upon, the right in question can not be implemented. Hence, it is a conditional right.

The first example is provided for in Annex III to the Agreement on Implementation of Art. VII. Whereas the agreement aims at unification of national rules for the determination of the customs value of imported goods on the basis of their real 'transaction value', it is recognized that developing countries may have to continue, for protective or revenue reasons, valuating them on the basis of 'officially established minimum values'. Hence, it is provided: "Developing countries which currently value goods on the basis of officially established minimum values may wish to make a reservation to enable them to retain such values on a limited and transnational basis under such terms and conditions as may be agreed to by the Members" (GATT Sekretariat, 1994: 228).

The General Agreement on Trade in Services aims, among other things, at achieving a progressively higher level of liberalization in the field of international trade in services, to be realized by means of successive rounds of negotiations. While the Agreement stipulates that "increasing participation of developing country Members in world trade [in services] shall be facilitated through negotiated specific commitments, it is provided

that "[t]he process of liberalization shall take place with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors. There shall be appropriate flexibility for individual developing country Members for opening fewer sections, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and, when making access to their markets available to foreign service suppliers, attaching to such access conditions aimed at achieving the objectives referred to in Article IV" (which outlines methods aimed at increased participation of developing countries) (GATT Secretariat, 1994: 343). A specific preferential entitlement providing developing countries with the right to place reasonable conditions on access to and use of public telecommunications transport networks and services, likewise to be agreed upon with other contracting parties before such conditions can be included in the developing Member's Schedule, are embodied in the Annex on Telecommunications (GATT Secretariat, 1994: 362-363).

Another example, providing for a preferential entitlement of the least-developed countries, is found in the Decision on Measures in Favour of Least-Developed Countries, which provides "that, if not already provided for in the instruments negotiated in the course of the Uruguay Round, notwithstanding their acceptance of these instruments, the least-developed countries, and for so long as they remain in that category, while complying with the general rules set out in the aforesaid instruments, will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs, or their administrative and institutional capabilities" (GATT Secretariat, 1994: 440). It is clear that also in this case the specific scope and modalities of these preferential commitments and concessions depend on their acceptance by developed country Members in the course of negotiations. A final example to be mentioned here is the important set of preferential "rights" - as they are usually referred to - arising from amended Art. XVIII of the GATT in combination with the Decision on Safeguard Action for Development Purposes (Dec. 1979: L/4897). Under Sections A and C of this Article, the scope of which was expanded by the aforementioned Decision, a developing country Member is entitled to modify or withdraw a tariff concession agreed to in its schedule of concessions, when it considers this desirable in order to promote the establishment, development, modification or extension of new or existing "production structures" (Section A); and, when it finds that measures available under Section A are insufficient to produce the desired

protective effects, it may even take resort to quantitative import restrictions adversely affecting the importation of the products to be locally produced (Section C). Under Section B, a developing country Member may, for the purpose of safeguarding its external financial position and to ensure "a level of reserves adequate for the implementation of its programme of economic development", control and restrict its general level of imports. Although, as was already observed, the privileges enjoyed by developing country Members are usually described in the literature as full subjective rights, this perception would seem to be not entirely justified: The circumstance that under the several Sections of Art. XVIII developing countries (a) shall notify the Contracting Parties, (b) shall enter into consultations or negotiations with other contracting parties directly affected by the proposed measures or having a substantial interest therein, and (c) are subject to the possibility of reprisals when the Contracting Parties do not concur in the developing Member's view that the measures taken are justified or if they do not approve of the way of implementation of these measures, would rather suggest that Art. XVIII merely endows developing Members with a right which can only be lawfully implemented after agreement has been reached as to its terms and conditions. This consideration justifies reference to this important preferential entitlement under the present category.

D. Specific Preferential Entitlements whose Implementability Is Uncertain to the Extent that Developed Country Members Are Merely Committed to Pursue their Implementation as far as They Consider this Practicable

An illustrative example of this kind of entitlement is provided by Art. XXXVII in Part IV of the GATT, which states: "The developed contracting parties shall to the fullest extent possible - that is, except when compelling reasons, which may include legal reasons, make it impossible - give effect to the following provisions: (a) accord high priority to the reduction and elimination of barriers to products currently or potentially of particular export interest to less-developed contracting parties, including customs duties and other restrictions which differentiate unreasonably between such products in their primary and in their processed forms; (b).refrain from introducing, or increasing the incidence of customs duties or non-tariff import barriers on products currently or potentially of particular export interest to less-developed contracting parties". Phrases like "to the fullest extent possible", "accord high priority to", etc., make clear that the

developed contracting parties were not prepared to incur real obligations under Chapter IV, and that the title of Art. XXXVII, "Commitments", pretends more than its provisions provide for. Hence, the paragraph quoted does not provide for a real preferential right for developing Members, despite the use of the word "shall".

Likewise, the Agreement on Government Procurement (1970) provides that "developed countries, in the preparation of their lists of entities to be covered by the provisions of this Agreement, shall endeavour to include entities purchasing products of export interest to developing countries" (BISD, Art. 3).

Again, the Agreement on the Application of Sanitary and Phytosanitary Measures (hereinafter referred to as the Sanitary Measures Agreement) states, with respect to the provision of technical assistance by developed Members: "Where substantial investments are required in order for an exporting developing country Member to fulfil the sanitary or phytosanitary requirements of an importing Member, the latter shall consider providing such technical assistance as will permit the developing country Member to maintain and expands its market access opportunities for the product involved" (.GAAT Secretariat, 1994 :75) and the Annex on Telecommunications to the General Agreement on Trade in Services provides, with respect to technical cooperation, that "embers shall make available, where practicable, to developing countries information with respect to telecommunications services and developments in telecommunications and information technology to assist in strengthening their domestic telecommunications services sector".(GATT Secretariat, 1994 : 363).

E. Specific Preferential Entitlements whose Implementability Is Even More Uncertain to the Extent that Developed Country Members Are Merely Required to Facilitate or Promote the Desired Result

A typical example of this type of preferential entitlement is provided for in the Agreement on Government Procurement (1979), which, after having stipulated that the protective needs of developing countries shall be borne in mind in the course of implementation of this Agreement, demands that developed contracting parties "shall, in the preparation and application of laws, regulations and procedures affecting government procurement, facilitate increased imports from developing countries"(BSID, N.43).

Again, the Agreement on Technical Barriers to Trade (the so-called "Standards Code"), which aims, among other things, at eliminating trade distortions resulting from (manipulations with) technical standards, provides: "Members shall take such reasonable measures as may be available to them to ensure that international standardizing bodies and international systems for conformity assessment are organized and operated in a way which facilitates active and representative participation of relevant bodies in all Members, taking into account the special problems of developing country Members"(GATT Secretariat, 1994 :153). And the General Agreement on Trade in Services provides in general terms: "The increasing participation of developing country Members in world trade shall be facilitated through negotiated specific commitments"(GATT Secretariat, 1994 : 330). It is obvious that such abstract instructions are far too vague and generic to produce directly claimable entitlements.

F. Abstract Preferential Entitlements whose Implementability Is Doubtful as a Result of the Circumstance that the Preferential Treatment to be Granted Is Not Specified

This also applies, or even more so, to the present category, which encompasses provisions according to which developed countries are merely committed to grant some preferential treatment, without in any way concretizing this commitment i.e. without specifying what kind of preferential treatment should be granted, and how or when this should be done. This kind of provision is found conspicuously frequently in documents or sections thereof dealing with preferential measures in favour of least-developed countries. A first example is the Agreement on Textiles and Clothing, which recognizes that during a transition period following upon the entry into force of this agreement a specific transitional safeguard mechanism (the so-called "transitional safeguard") may have to be applied. In this connection, the Agreement stipulates that in the application of this transitional safeguard, " least-developed country Members shall be accorded treatment significantly more favourable than that provided to the other groups of Members referred to in this paragraph, preferably in all its elements but, at least, on overall terms" (GATT Secretariat, 1994: 95).

Similarly, the Agreement on TRIP's provides, with respect to technology transfer measures or incentives to be offered by developed country Members, without further specification: "Developed country Members shall provide incentives to enterprises and institutions in their

territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base" (GATT Secretariat , 1994: 399).

Among several Decisions which are relevant in this connection, the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries is exemplary. Herein the Ministers agree "to ensure that any agreement relating to agricultural export credits makes appropriate provision for differential treatment in favour of least developed and net food-importing developing countries".(GATT Secretariat, 1994 : 448).
In these cases the group of least-developed countries can merely wait and hope for positive results.

G. Abstract Preferential Entitlements whose Implementability Is Further Limited by the Provision that the Preferential Treatment to be Granted must First be Agreed upon "on Mutually Agreed Terms"

This category of preferential entitlement is subject to a condition additional to the former category, to the extent that in this case developed country Members are not even directly committed to grant *some,* though non-identified, preferential treatment, since the fulfilment of this commitment depends on a prior agreement; which, however, may not be reached.

An example in case is the Agreement on Implementation of Art. VII, which provides, with respect to technical assistance: "Developed country Members shall furnish, on mutually agreed terms, technical assistance to developing country Members that so request. On this basis developed country Members shall draw up programmes of technical assistance which may include, *inter alia,* training of personnel, assistance in preparing implementation measures, access to sources of information regarding customs valuation methodology, and advise on the application of the provisions of this Agreement"(GATT Sekretariat, 1994 : 209).

Similarly, the Agreement on TRIP's stipulates, likewise with respect to technical cooperation, that "in order to facilitate the implementation of this Agreement, developed country Members shall provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favour of developing and least-developed country Members" (GATT Secretariat : 399).

H. Preferential Entitlements whose Implementability can Hardly be Ensured as a Result of the Provision that the Treatment in Question will be Granted to Developing Countries "in Particular"

The quality of the aforementioned preferential entitlement drops to an even lower legal echelon when the generic commitment to grant an unspecified preferential treatment to other Members shall not be enjoyed by developing countries exclusively, but merely by them *in particular*.

An example of this low- grade kind of preferential entitlement is provided by the Standards Code, which in seven sub-paragraphs of its Article on "Technical Assistance to Other Members" stipulates that "Members shall, if requested, advise other members, especially the developing country Members". For instance, members shall, if requested, advise other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding the establishment of national standardizing bodies, and participation in the international standardizing bodies, and shall encourage their national standardizing bodies to do likewise" (GATT Secretariat, 1994: 151-152).

Similarly, the Sanitary Measures Agreement provides, in its section on technical assistance measures, that "Members agree to facilitate the provision of technical assistance to other Members, especially developing country Members, either bilaterally or through the appropriate international organizations"(GATT Secretariat, 1994 : 74).

I. Preferential Entitlements whose Implementability is not at All Ensured as a Result of the Provision that Developed Country Members Merely should - in Stead of "shall" - Grant the Treatment Required

It is clear that commitments undertaken by developed Members under the present category are not obligatory. In fact, they are political rather than legal commitments, due to the use of the word "should" in stead of "shall ".

An example of this kind of preferential entitlement is provided by the Sanitary Measures Agreement, which, in connection with the phased introduction of standardized sanitary schemes, merely recommends special and differential treatment in favour of developing countries: "Where the appropriate level of sanitary or phytosanitary protection allows scope for the phased introduction of new sanitary or phytosanitary measures, longer time-

frames for compliance should be accorded on products of interest to developing country Members so as to maintain opportunities for their exports"(GATT Sekretariat, 1994 : 75).

J. Preferential Entitlements whose Implementability can not be Ensured as a Result of the Provision that Developed Country Members are Merely Entitled, but not Obliged, to Grant the Treatment in Question

A further decrease in level of legal commitment results from provisions in which developed Members are not even required that they "should" take certain preferential measures, but in which they are merely *entitled* to take such measures.

The most prominent example representing this category certainly is the right — but *not* the obligation of developed Members to install preferential tariffs for developing Members under the Generalized System of Preferences (GSP), which since 1979 is legally governed by the provisions of the Enabling Clause. Ever since the GSP was legalized by the waiver Decision of June 1971 (Dec., 1971: L/3545), all GSP schedules have been governed by the Agreed Conclusions of the Special Committee on Preferences, which were annexed to Decision 75 (S-IV) of the Trade and Development Board of UNCTAD (BSID, N.57), which determine the legal status of the GSP regime.

Those specify, among other things, that the granting of tariff preferences does not constitute a binding commitment and that it does not in any way prevent their subsequent withdrawal in whole or in part or the subsequent reduction of tariffs on a most-favoured nation basis. Thus, the benefits of the GSP regime do not arise from a preferential right of developing countries or even from a political obligation incumbent on developed ones: The possibility of their enjoyment entirely depends on the political will of developed Members to implement a right vested in *them* under the Enabling Clause. The justification for cataloguing the enjoyment of GSP profits as a category of preferential entitlements arises from the consideration that without the taking of special legal measures, *in casu* the adoption of the 1971 waiver Decision and the 1979 Enabling Clause, the most-favoured-nation principle embodied in Art. 1 of the GATT would prohibit the preferential treatment involved (W.D. Verwey, 1990: 131-136).

K. Preferential Entitlements which Merely Provide Developing Countries with the Privilege to Apply for a Specific Preferential Treatment

The present category reflects a kind of preferential entitlement which lies at about the same legal level as the former one: When developing Members, and they exclusively, are entitled to *apply for* a specific preferential treatment, they are fully dependent on the preparedness of the relevant decision-making authority to decide whether such application will be granted. The preferential element in this case is herewith of a very indirect nature: Developing Members are the only ones entitled to apply, but they cannot demand that the reply will be positive.

An example is provided by the Standards Code, which recognizes that developing Members may face special problems, including institutional and infra structural problems, in the field of preparation and application of technical regulations, standards and conformity assessment procedures; and that their stage of technological development may hinder their capability to discharge fully their obligations under this Agreement for a considerable period of time. Hence, the Committee on Technical Barriers to Trade, "is enabled to grant, upon request, specified, time-limited exceptions in whole or in part from obligations under this Agreement" (GATT secretariat, 1994: 154).

Another example is found in the Sanitary Measures Agreement: "With a view to ensuring that developing country Members are able to comply with the provisions of this Agreement, the Committee is enabled to grant to such countries, upon request, specified, time-limited exceptions in whole or in part from obligations under this Agreement, taking into account their financial trade and development needs" (GATT Secretariat, 1994 : 75).

A somewhat stronger claim arises when a formulation is added according to which ail applying developing Member may count on a positive reply when it can show good cause.

This is the case, for instance, in Annex III to the Agreement on the Implementation of Art. VII, which deals with the time-schedules applicable to the implementation of the standardization of rules governing customs valuation of imported goods. Normally, developing Members are entitled to a transition period of five years. However, for many of them this period may turn out to be too short. Hence, it is provided: " The five-year delay in the application of the provisions of the Agreement by developing country Members provided for in paragraph 1 of Article 20 may, in practice, be

insufficient for certain developing country Members. In such cases a developing country Member may request before the end of the period refered to in paragraph 1 of Article 20 an extension of such period, it being understood that the Members will give sympathetic consideration to such a request in cases where the developing country Member in question can show good cause"(GATT Secretariat, 1994: 228).

The same kind of provision is found in the Decision on Texts Relating to Minimum Values and Imports by Sole Agents, Sole Distributors and Sole Consessionaires which, again with respect to the maintenance by developing Members of "officially established minimum values" in stead of the required "real transaction values" of imported goods, provides: " Where a developing country makes a reservation to retain officially established minimum values within the terms of paragraph 2 of Annex III and shows good cause, the Committee shall give the request for the reservation sympathetic consideration" (GATT Secretariat, 1994: 455).

L. Preferential Entitlements whose Implementability Entirely Depends on the Interpretation by Developed Country Members of the Stipulation that, in the Course of a Specific Action, they Merely "shall Take the Special Interests of Developing Countries into Account"

This category represents the lowest-echelon entitlement to be considered as being of at least some legal relevance: At the utmost, one could say that a commitment, incumbent upon developed country Members, " to take the special needs/interests/problems of developing countries into account " in the course of applying relevant instruments may result in the claim that the general principle of law called 'the principle of good faith' requires that one should not take implementation measures without at least having considered their possible impact upon the economies of developing countries; but no more than that.

Often, such provisions are found in the preambula of GATT-related instruments, a circumstance which re-emphasizes their poor legal status which reflects no more than political declarations of good intention. Thus, in the Preamble to the Agreement on Agriculture Members have agreed that " in implementing their commitments on market access, developed country Members would take fully into account the particular needs and conditions of developing country Members by providing for a greater improvement of opportunities and terms of access for agricultural products of particular

interest to these Members" (GATT Secretariat, 1994:39). A good example of a similar provision embodied in the operative paragraphs of relevant instruments is the Agreement on the Implementation of Article VI of the GATT 1994 which, in relation to anti-dumping measures, illustratively demands "that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members"(GATT Secretariat, 1994 : 191).

Similarly, the Agreement on Import Licensing Procedures, which requires that in **the** course of allocating import licences consideration shall be given to ensuring a reasonable distribution of licences to new importers, stipulates that in this regard "special consideration should be given to those importers importing products originating in developing country Members"(GATT Secretariat, 1994: 260); and the Decision on Trade and Environment, finally, instructs the WTO Committee on Trade and Environment to make recommendations as regards "the need for rules to enhance positive interaction between trade and environmental measures, for the promotion of sustainable development, with special consideration to the needs of developing countries, in particular those of the least developed among them"(GATT Secretariat, 1994 : 470).

This completes the present concise survey of the various categories of preferential rights and other entitlements for developing countries currently found in international trade law instruments adopted before and during the Uruguay Round. This survey may sustain the thesis, that despite initial efforts to eliminate the rather complex network of differential and preferential entitlements in the GATT legal system, the principle of preferential treatment has survived, albeit in combination with the principle of graduation, and continues to constitute part of the new legal regime governed by the World Trade Organization.

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