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Edited by George A. Bermann and Petros C. Mavroidis

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GEORGE BERMANN AND PETROS C. MAVROIDIS

Developing Countries in the WTO System

In this volume, we have put together an internally coherent series of papers discussing the most crucial, to our mind, aspects of developing countries' participation in the WTO. Its timing was deliberate: The *Doha* Round, hailed as the development-round, was supposed to address issues of concern for developing countries. And there are many: preference erosion (as a result of tariff reductions during the Uruguay Round), asymmetric (across sectors) tariff liberalization, the onus of implementing the *TRIPs Agreement*, participation in dispute settlement procedures, and the current remedies régime, to name a few. *Special and differential treatment*, the cornerstone describing developing countries' participation in the GATT/WTO, is very much under discussion in the ongoing round. There is widespread (across developing countries) dissatisfaction with its current workings, and voices for change are multiplying.

One of the major challenges facing the WTO is how to facilitate the fuller integration of developing countries in the multilateral trading system. Although the share of developing countries as a group in world trade has increased to 30 percent in recent years, the majority of developing countries, particularly the least-developed countries (LDCs), have seen their share in world trade stagnate or even decline. The lack of active participation of LDCs in the multilateral trading system has been a source of concern. Historically, special and differential treatment, technical cooperation, and capacity building have been at the forefront of the GATT/WTO's efforts to facilitate the integration of developing countries into the multilateral trading system. In recent times, however, doubts have been expressed as to the effectiveness of special and differential treatment in assisting developing countries to participate actively and derive significant benefits from the multilateral trading system. Still, however, most developing countries dispute the assessment that preferences have not been helpful and that their integration into the multilateral trading system would have been achieved at a faster pace, had they accepted to follow WTO disciplines like other Members. Moreover, these developing countries have always insisted on the legal enforceability of special and differential treatment provisions like any other provisions

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of the WTO Agreements. Developed countries, in contrast, have mostly taken a contrary view and argue that special and differential treatment-related provisions should be seen for what they are: voluntary commitments assumed by developed countries in favor of developing countries.

Our invited authors did a magnificent job in bringing out all those issues and more in the pages that follow.

We begin with the contribution by **Edwini Kessie**, who discusses the many provisions in the WTO contract regarding the special and differential treatment accorded to developing countries. This paper briefly examines the concept of special and differential treatment and how it has evolved in the multilateral trading system; it then identifies five classes of special and differential treatment provisions and discusses whether they are legally enforceable before offering some concluding remarks on the role of such provisions in the multilateral trading system. Kessie concludes that, in general, these types of provisions are not far reaching because they are often expressed in best-efforts terms. There is, however, one very notable exception: the generalized system of preferences (GSP), whereby donors will accept products originating in beneficiaries at a preferential tariff rate, in contravention of the non-discrimination principle.

The paper by **Nuno Limão and Marcelo Olarreaga** offers us an assessment from an economic perspective of the value of the GSP to developing countries. They draw a parallel between preferential trading agreements (like free trade areas) and GSP schemes to make their point about preference erosion. The proliferation of preferential trade liberalization over the past 20 years has raised the question of whether it slows down multilateral trade liberalization. Recent theoretical and empirical evidence indicate that this is the case, even for unilateral preferences that developed countries provide to small and poor countries, but there is no estimate of the resulting welfare costs. Moreover, beneficiaries come to eventually oppose non-discriminatory (MFN) liberalization, because reduction of MFN rates equals erosion of their preferences. Hence beneficiaries become a stumbling block working against the function of the WTO. This stumbling block effect can be avoided by replacing the unilateral preferences by a fixed import subsidy, which the authors argue generates a *Pareto-improvement*. More importantly, they provide the first estimates of the welfare cost of preferential liberalization as a stumbling block to multilateral liberalization. By combining recent estimates of the stumbling block effect of preferences with data for 170 countries and more than 5,000 products, they calculate the welfare effects of the United States, European Union, and Japan switching from unilateral preferences to LDCs to an import subsidy scheme. Even in a model with no dynamic gains to trade, they find that the switch produces an annual net welfare gain for the 170 countries that adds about 10 percent to the estimated trade liberalization gains in the *Doha* Round. It also generates gains for each group: the United States, European Union, and Japan (\$2,934 million); LDCs (\$520 million); and the rest of the world (\$900 million).

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In the next chapter, **Frederick M. Abbott** shifts the focus to a very idiosyncratic developing country, China. He examines the legal and WTO governance implications of China's alleged failure to fulfill its obligations under the TRIPS Agreement. The significant escalation of interest by the United States and other developed countries in China's intellectual property rights enforcement activity merits, in the author's view, special attention because of its systemic implications. This subject matter forms a critical part of China's continuing WTO dialogue with the United States, European Union, Japan, and Switzerland and tests the capacity of the WTO dispute settlement system to constrain state behaviors. China appears to perceive that its national interest is not aligned with its TRIPS Agreement and Accession Protocol obligations. Though the United States may well initiate a WTO dispute settlement action, it seems unlikely that doing so will result in near-term changes to China's conduct. WTO dispute settlement is not designed to force immediate changes to government behaviors, particularly when the party under complaint is not overly concerned about the potential for withdrawal of concessions. Politicians and industry leaders who are demanding changes by China will almost certainly be frustrated at the WTO. This frustration raises two questions: First, will the United States be justified in imposing extra-WTO-legal sanctions on China? Second, if this action is justified, is it a good idea? The answers to these questions, explored in this paper, are "probably yes" and "probably no," respectively. To paraphrase the title of Olivier Long's classic work on the GATT, this case may help define the limits of the law in the WTO system.

With **Juan A. Marchetti's** contribution we shift focus yet again, this time to evaluate the impact of GATS on developing countries. In the author's view, the task in the months ahead in the *Doha* Round of multilateral trade negotiations is particularly challenging for developing countries in the services negotiations. This is an opportune time to assess what developing countries have done so far and what they should be doing to achieve (1) a deeper integration of their economies into the world trading system and the (2) advancement of higher and sustainable levels of economic growth. Trade liberalization is a necessary but not a sufficient condition to attain economic development. Many other factors, such as geography, resource endowments, the protection of property rights in its largest sense, and the quality of the institutional and regulatory frameworks, are determinants of success. It would be unfair to place all the expectations of success in only one aspect of any development policy like trade and even more myopic in only one subset of the trade in general (i.e., services). Nevertheless, services are essential for development, and further liberalization of trade in services can lead to improvements to human welfare. As such, developing countries should take the initiative (unilaterally) to liberalize their own trade regimes as they pertain to services within the context of multilateral negotiations on the further liberalization of trade in services. After an elaborate discussion on the significance of services for development and the costs of protection and an analysis of developing countries' overall negotiating positions thus far in the current round, the following basic

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themes emerge from this discussion: first, the essential role of services for economic development; second, the high costs imposed by trade protection; third, the benefits of liberalization; fourth, the need to make use of the WTO forum to enhance credibility and sustain domestic regulatory reform programs; fifth, the challenges of regulatory reform and the importance of appropriate sequencing; and, finally, sixth, the benefits of seeking further market access overseas in those areas in which developing countries have a comparative advantage.

Kal Raustiala focuses on four interesting questions about trade in services raised by **Marchetti** in his contribution. First, why does the multilateral trading system not discipline protectionism in services as much as it does in goods? Ostensibly, services trade, which also encompasses professional services, will undoubtedly dramatically increase over the next decade. Although the structural barriers that keep some services purely local still exist, trade in services increasingly transcends these barriers through technology. On basic economic grounds, services trade should rationally have a larger part of the WTO agenda in the current round and perhaps an even larger part in future rounds of negotiations. Trade barriers in services tend to be in the form of complex nontariff barriers, which are more difficult to regulate effectively compared with more transparent barriers like tariffs. Moreover, unlike trade in goods, disciplines on services were only negotiated and later agreed to during the Uruguay Round, almost 50 years after GATT, in which membership was much less heterogeneous than that of the GATT CONTRACTING PARTIES. Second, what is the role of WTO negotiations in reducing regulatory barriers? Raustiala comments that the inference that the GATS has actually resulted in a decrease in the trade in services is unlikely, though it leads to speculation as to what evidence exists indicating that GATS is actually promoting rather than inhibiting trade in services. Third, what promotes or demands more unilateralism in the trade in services vis-à-vis other areas of WTO negotiation? In this context, the author borrows from cooperation theory to advance his conclusions that account for the particularities of services trade. Fourth, why has there been a lack of progress on mode 4? The comment suggests that in the final analysis political obstacles are at play, impeding serious liberalization in the movement of persons within the WTO, despite the enormous economic gains that would accrue to both migrants and their host countries.

Jayashree Watal's contribution concerns the developing countries' adherence to the TRIPS Agreement, one of the most contested topics regarding their participation in the WTO. The TRIPS Agreement provides minimum standards for the protection of intellectual property rights and does not envisage harmonization of these rights among all WTO Members. It makes it clear that Members are not obliged to implement more extensive protection but does not prevent them from doing so. The *demandeurs* for the inclusion of an intellectual property agreement in the Uruguay Round of negotiations were developed countries. One of the reasons for inclusion of this subject in trade negotiations may well have been the attractiveness of the trade enforcement mechanism. However, more importantly,

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developed countries saw the trade forum as one in which the chances of making progress from their perspective were higher because of the possibilities of making trade-offs with other areas. Even if not all developing countries participated in these negotiations in equal measure, it would be fair to say that their perspective was represented. As is widely acknowledged, the TRIPS Agreement, in an effort to strike a proper balance among the differing interests of the participating countries, provides for significant flexibility in the protection to be given (see examples in the Annex). This flexibility, which went considerably further than some of the *demandeurs* in the negotiations would have liked and were achieving in bilateral agreements at the time, resulted from a compromise achieved through negotiation by developing countries acting collectively and making issue-based alliances in a multilateral context.

The TRIPS Agreement continues to be the generally accepted point of reference for the protection that countries should give to the intellectual property of others. This does not mean that it is not criticized, but this criticism comes from both sides. On the one hand, some developed countries do not accept it as necessarily providing for adequate and effective protection of their intellectual property, and there has been a continuing effort to get trading partners to provide enhanced protection in important respects. On the other hand, developing countries have proposed, and in one important case – that of TRIPS and public health – achieved amendments to the TRIPS Agreement to improve the balance from their perspective.

The next five chapters discuss developing countries' participation in the WTO in general and in dispute settlement proceedings in particular. **Håkan Nordström** discusses participation of developing countries in the WTO. The WTO takes pride in being a member-driven organization, with decisions taken by consensus among all member states. But how active are the various member states in reality? In particular, to what extent do developing countries participate in the proceedings – and if not, why not? This chapter offers new evidence on this subject from the WTO official records for 2003. The data he put together show that the activity level is highly uneven and, further, is correlated closely with size and income levels. The poorest LDCs often lack WTO representation in Geneva. When it comes to *active* participation, the data are even more telling: the relative silence of smaller and poorer member states is especially telling at the technical level (Committees and Working Groups) where the substantive work is carried out. This paper suggests that there is a positive correlation between the income level of participants and the intensity of participation in the WTO in general.

Jeffrey L. Dunoff, in his comment, first congratulates **Nordström** for making at least two important contributions to the literature on developing state participation at the WTO. First, in his view, the author correctly directs our attention away from developing state participation in WTO dispute settlement and toward developing state participation in the WTO's legislative processes; second, the empirical research provides a large and suggestive body of data that can usefully

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inform discussions of developing state participation. In the author's view, Nordström's data and his richly suggestive analysis could support an entire research agenda on developing state participation at international organizations. The comment further addresses the paradox that lies at the heart of Nordström's analysis and notes that elucidating that paradox points toward important methodological and normative questions that his paper does not address: Nordström's data perhaps misleadingly suggest that developing states played a relatively minor role in WTO processes during 2003, even though it would seem that they played a critical role then in the lead-up to the Ministerial Conference in Cancun. It is difficult to square these two accounts, and the tension between them suggests that there are difficult methodological questions about how to measure participation and influence at the WTO. Cancun's failure does suggest the need to think carefully about both the virtues and the drawbacks of increased developing state participation at the WTO.

Marc L. Busch and **Eric Reinhardt** discuss developing countries' participation in WTO dispute settlement proceedings. It has long been observed that developing countries made scant use of dispute settlement under the GATT. Some observers go so far as to suggest that developing countries will have greater recourse to the WTO dispute settlement system because of its more legalistic architecture compared with the GATT's power-based diplomatic system. Busch and Reinhardt argue that this conventional wisdom is wrong. In assessing how developing countries have fared in dispute settlement, two questions beg empirical attention. First, have developing countries secured more favorable trade policy outcomes in WTO versus GATT dispute settlements, and second, what explains any differences in the outcomes realized by developing, as opposed to developed countries? The authors dissent from the well-accepted view that the ushering in of a rules-based dispute settlement system would result in greater participation of developing countries than in the GATT power-based system. They argue that the Dispute Settlement Understanding (DSU) only serves to reinforce the (1) inability of developing countries to extract concessions from (mostly) developed country defendants in WTO litigation in light of the incentives to litigate and (2) developing countries' lack of capacity to push for early settlement. The authors argue that "early settlement" offers the greatest likelihood of securing full concessions from a defendant at the GATT/WTO, a pattern that has been less evident in cases involving developing countries. The data provided bear out their argument: on the one hand, poorer countries have not secured significantly greater concessions under the WTO than under GATT, and, on the other, the increasing gap between rich and poor Members in the performance of the dispute settlement stems from a lack of legal capacity, not a lack of market power with which to threaten retaliation. The main implication of their argument is that developing countries need more assistance before litigation commences.

Niall Meagher's chapter sets forth some thoughts based on the author's personal experience in representing developing countries in WTO dispute settlement

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proceedings. There have been very many thorough statistical studies relating to the dispute settlement system and, in particular, developing country participation in it. This paper is not intended to duplicate that work. Rather than trying to draw empirical conclusions from the statistics about which developing countries have participated in the system and the rate at which they participate, the paper proposes instead to discuss some practical aspects of the resource constraints facing developing countries in participating in WTO dispute settlement. Any discussion of representing developing countries in WTO dispute settlement proceedings must probably begin and end with the question of the resources available to them and whether these resources enable them to participate on equal terms with developed countries. The question of resources is frequently approached simply from the point of view of developing countries' financial ability to obtain adequate legal advice. This is, of course, an important factor – and perhaps is the most important factor – but resource constraints are not limited simply to the ability of a developing country to retain good legal counsel. Instead, they can manifest themselves in many other ways and influence every aspect of the decision of whether to participate in dispute settlement proceedings. These resource constraints condition developing countries' ability to participate in and benefit from not just the dispute settlement system but all aspects of the WTO. This paper therefore reviews some of the practical ways in which these constraints – financial and otherwise – impede developing country participation in the dispute settlement system on an ongoing basis.

Chad P. Bown in his comment on **Meagher's** paper presents a very interesting, accessible, and poignant account of some of the practical problems facing poor countries (and the individuals who advise them) in WTO dispute settlement litigation. The comment focuses on three areas related to the provision of WTO litigation assistance to poor countries. It uses an economic perspective to expand on (and complement) some of the points that Meagher's analysis touches on only briefly. It first highlights the role that economics could play, before advocating for an increased role for the complementary and necessary services that economists should contribute to the lengthy process of WTO litigation. If the purpose of subsidized intervention on behalf of poor country governments is to more fully *inform* (as opposed to simply guide) the client's consideration of the WTO litigation tool, the author argues that providing poor country litigants with more economic information is extremely important. Finally, the comment considers a somewhat broader perspective by discussing some of the benefits to expanding legal assistance center services like the Advising Centre on WTO Law (ACWL), relative to alternative sources that might provide basic legal services to developing countries.

Mateo Diego-Fernández's contribution concerns the current remedies in the WTO. An unpopular remedy, retaliation is the last resort by which to enforce a WTO ruling and has often been criticized as being trade-disruptive and one that affects the Member that exercises it in the first place. It could also be an unworkable

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tool in the hands of many, because of its associated costs. However, retaliation (or the threat thereof) is a key element for compliance or for reaching mutually acceptable solutions. In addition, it is the only tool for rebalancing the level of rights and obligations in the absence of compliance. The author collaborated in preparing Mexico's proposal to formally introduce tradable retaliation (remedies) in the WTO dispute settlement understanding (DSU), whereby the entitled-to-retaliate Member could auction off to another Member its right to do so. Mexico's proposal to amend the DSU aims at solving what it believes to be the central problems in the functioning of the DSU; namely, the period of time during which a WTO-inconsistent measure can be in place without consequences and the fact that retaliation is an empty shell in the hands of many. Accordingly, the proposal contains the following four suggested ways of dealing with this problem: first, early determination and application of nullification or impairment; second, retroactive (as opposed to prospective) determination and application of nullification or impairment so that retaliation is exercised taking into account the time that has elapsed since imposition of the measure; third, an injunction-like mechanism that allows Members to obtain relief where a measure causes or threatens to cause damage that would be difficult to repair; and, fourth, negotiable remedies, which offer the possibility of transferring the right to retaliate to third Member(s) that may use it more effectively. The paper also addresses the issue of how enhancing rules on retaliation would benefit developing countries above all and elaborates on how the Mexican proposal to amend the DSU might contribute to this end.

Gene M. Grossman and **Alan O. Sykes** deal with the most notorious GSP-related dispute submitted to the WTO so far. The WTO case brought by India in 2002 to challenge aspects of the European Community GSP brings fresh scrutiny to a policy area that has received little attention in recent years – trade preferences for developing countries. Preferential tariff treatment is inconsistent with the MFN obligation embedded in Art. I GATT. However, the legal authority to deviate from the MFN obligation was incorporated into the law of the WTO along with the GATT itself with the adoption of the so-called Enabling Clause by the GATT CONTRACTING PARTIES in 1979. Although trade discrimination favoring developing countries is the essence of any GSP scheme, India's WTO complaint raised the question of what type of discrimination is permissible – must all developing countries be treated alike, or can preference-granting nations discriminate among them based on various sorts of criteria? The WTO Appellate Body *formally* affirmed the ruling in India's favor in early 2004. However, in *substance*, by modifying the Panel's findings in a way that seemingly authorizes some differential treatment of developing countries based on their "development, financial and trade needs," this ruling gave India a pyrrhic victory, if at all. The purpose of this paper is to review the current state of the law in the WTO system and to ask whether economic analysis can offer any wisdom about the proper extent of "discrimination" through GSP measures. The issues are challenging ones, both from a legal and an economic standpoint. There are good economic reasons to

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be concerned about discrimination and reciprocity in GSP schemes, as well as respectable legal arguments that they should be strictly limited. GSP benefits are “gifts” of a sort; however, tight limitations on their terms may put an end to them altogether. It is exceedingly difficult to say whether discrimination and reciprocity in GSP schemes make the trading community worse off or better off over the long haul. The authors take the view that, in the India case, Pakistan was paid by India’s money due to the ensuing trade diversion. They go one step further though, and argue that, in light of substantial empirical evidence, it is probably the case that the candle (income) is not worth the flame (GSP schemes).

Jeffrey Dunoff also comments on the contribution by **Grossman** and **Sykes**. In his view, the authors provide an insightful analysis of the GSP dispute. Their contribution generates a number of conclusions, nearly all of which emphasize the difficulty of the issues raised by this dispute. The ultimate question raised by the authors’ analysis is whether the GSP dispute is one of those hard cases that make bad law. The comment examines why conventional analyses cannot inform us as to whether the Appellate Report created good law and raises the following three questions about the report: first, the relationship between the exceptions to GATT disciplines found in the Enabling Clause and Art. XX GATT; second, the institutional role of the Appellate Body in “hard cases” like the GSP dispute; and, third, the purpose of GSP programs. As to the first question, the comment raises the point that there is possibility of a serious tension between the logic of Art. XX GATT and the logic of the Enabling Clause, which reflects a larger, unresolved tension over whose preferences count in the context of measures related to labor, environment, and other forms of conditionality. With respect to the second question, the comment states that it seems the Appellate Body’s “middle course” effectively positions WTO adjudicatory bodies as the arbiters of evaluating preference programs, and as such they address fundamental policy questions on a case-by-case basis. Accordingly, the comment suggests that from an institutional standpoint the Appellate Body may have created bad law by carving out a continuing and primary role for itself in the highly politicized field of GSP. As regards the final question, the GSP dispute is a hard case because at some level it pits against each other two plausible approaches of international law: international law in general and international trade law in particular help states solve collective action problems, address externalities, and generate public goods, whereas the other approach, which the comment supports, is that a primary function of international law is to influence and improve the functioning of domestic institutions. In the final analysis, the comment concludes by stating that the Appellate Body may have avoided speaking to these conflicting visions of international law by deciding the case on procedural grounds and may have thus minimized the extent to which the GSP dispute was a hard case that made bad law.

In his comprehensive comment, **Jeffrey Kenners** first begins by tracing the contested provisions of the European Communities (EC) GSP scheme to the emergence, in the early 1990s, of a broader conception of EC development policy that

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incorporated the promotion of democracy and human rights, including labour rights. Against this background, his comment evaluates the extent to which it has been possible for the European Community to confirm that there is now an objective process for granting special trade preferences in its reformed GSP following the Appellate Body rulings in *EC – Tariff Preferences*. In its remodeled GSP+ scheme, the EC, in principle, currently offers special incentives to an unspecified number of applicant countries for the purposes of encouraging “sustainable development” and “good governance” with reference to a list of international conventions. The GSP+ is open to all developing countries with “the same development needs.” Accordingly, the European Community believes, and the author agrees, that it is able to demonstrate that it is pursuing its development policy priorities in a WTO-consistent manner.

Anastasios Tomazos’ contribution aims at providing a critique of the Appellate Body’s reasoning and its ultimate conclusion in the *EC – Tariff Preferences* dispute. After putting forth the argument that the Appellate Body’s ruling cannot be supported on either legal and economic grounds, the paper advances the argument that the decision is also untenable on broader political/systemic grounds primarily because it maintains the status quo and squanders an opportunity to give WTO Members the impetus to thoroughly review whether the Enabling Clause, in whole or in part, still fulfills its original mandate.

Finally, Patrick Low, as the title of his paper suggests, argues that the contribution of the WTO to developing countries, be it negative or positive, is in the hands of others. The additional question posed in this paper presupposes that developing countries can also influence the contribution that the WTO makes to their growth and development. Both of these questions inform the paper’s analysis. It has become increasingly obvious that important differences in interests and priorities exist among developing country WTO Members: they are different in fundamental ways and these differences are bound to be reflected in their priorities and interests. Accordingly, developed countries will not agree to uniform policy treatment for all developing countries in the multilateral trading system, and many developing countries have similar reservations. The paper employs the following four-fold characterization of the WTO for the practical purpose of ordering questions about potential and actual benefits derived by developing countries from the multilateral trading system: first, a system of rules; second, a negotiating forum; third, a dispute settlement mechanism; and fourth, a vehicle for reducing information asymmetries among nations with respect to trade policy. Before going into the details, the paper considers, at a slightly more abstract level, the theoretical cost-benefit set for developing countries arising from involvement in the WTO. The following basic questions are posed and subsequently addressed. Why does it make sense for developing countries to embrace a legally binding set of rights and obligations internationally? Why do countries simply not act autonomously in policy formulation? What are the supposed benefits of