

# How to Reflect Better the Interests of Developing Countries in the World Trading System?<sup>1</sup>

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## ABSTRACT

Recognizing that the development dimension of the world trading system has been increasingly important, we would like to analyze how the WTO system shall implement effectively the preferences for developing countries with an aim of exploring the development-friendly policies. First, we examine development of the preferential treatment rules under the GATT/WTO system. Second, we analyze how the S&D rules of WTO Agreements and GSP work in practice, while identifying their limitations. Then, we discuss policy recommendations for the effective implementation of S&D provisions, in particular, in the areas of the Anti-Dumping Agreement, the Subsidies Agreement and the Dispute Settlement Understanding (DSU). Among policy recommendations include (i) the higher thresholds of *de minimis* dumping margin and of negligible volume of imports, and differentiated procedures governing facts available for the AD Agreement, (ii) preferential rules for non-actionable subsidies and more time for consultations for the Subsidies Agreement, (iii) damage compensation and more remedy options for DSU and (iv) the objective rules on eligible countries and products, and graduation for the improved GSP.

Key words: special and differential (S&D) treatment, the generalized system of preferences (GSP), Anti-Dumping Agreement, Subsidies Agreement, DSU

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## **I. Introduction**

Under pre-WTO world trading system, the developing countries had enjoyed some privileges under the General Agreement on Tariffs and Trade (GATT), though their benefits were limited. After the WTO system entered into force, developing countries entitle preferential treatment more extensively under a variety of special and differential (S&D) treatment provisions of individual Agreements. Developing countries, however, expressed dissatisfaction with the WTO system, claiming that the main beneficiaries of the new multilateral trading system are developed countries rather than themselves. It doesn't mean that developing countries do not get any benefit at all, but it means that developing countries get disproportionately less benefits than developed countries. Thus, developing countries have demanded for more regard for their concerns in the next multilateral trade negotiations. As a result, the WTO members launched the Doha Development Agenda (DDA) negotiations whose mandate reflects developing countries' concerns and policy objectives comprehensively.

Though WTO Members made efforts to implement S&D rules, especially through the Committee on Trade and Development, they faced inherent problems. One of the fundamental problems is that most of the S&D treatment provisions do not contain tangible and substantive benefits. Recognizing those problems of previous and existing S&D rules, a number of studies analyzed this issue. Among them are Oyejide (2002), Low (2003), Hoekman (2005) and Santos et al. (2005). Hudec (2002) examines whether or not the remedies available under the WTO Dispute Settlement Understanding (DSU) are adequate for developing countries. While the previous studies analyze the S&D treatment rules with valuable recommendations, they fail to touch upon enough how to operate the S&D rules effectively. Thus we would like to analyze how the WTO system shall implement the S&D treatment provisions effectively with an aim of exploring the development-friendly policies that may be reflected in the ongoing DDA negotiations.

This paper is organized as follows. In Section II, we describe development of the preferential treatment rules under the multilateral trading system. In Section III, we analyze the S&D provisions of WTO Agreements and examine how they work in practice with a view to identifying their limitations. We also analyze operations of the generalized system of preferences (GSP). In Section IV, we discuss policy recommendations for the effective implementation of S&D provisions with an aim of helping the developing countries' participation in the world trading system. Finally, this paper is concluded with future issues in Section V.

## **II. Development of preferential treatment under GATT/WTO**

### **1. Pre-WTO rules**

During pre-WTO period, developing countries had successfully achieved a number of major developments for preferential treatment. They include the addition of Part IV to GATT, the introduction of GSP and the adoption of the Enabling Clause<sup>3</sup>. After a series of developing countries' initiatives to reflect their concerns, three Articles were added to GATT as Part IV during 1960s, which are Articles XXXVI, XXXVII and XXXVIII. Regarding the nature of these Articles, it is argued that while they are primarily "hortatory" in wording, and so without direct legal implications, Article XXXVII, paragraphs 1(b) and 1(c), may have direct legal impact.<sup>4</sup>

In 1971, GATT approved a waiver of Article I of the GATT for a period of 10 years. Under the decision, the developed country members are permitted to provide preferences for developing countries without offending the most-favoured-nation (MFN) principle. Then, the European Communities (currently the European Union) introduced the generalized system of preferences. Since then, numerous industrial countries, including the United States and Japan, followed the suit.

As the operation of GSP closed to the end, GATT members adopted in 1979 a decision, which is called as the Enabling Clause. It provided permanent legal basis for GSP. Under the GSP, developed countries offer non-reciprocal preferential treatment to certain products originating in some eligible developing countries. While the GSP takes the forms of zero or lower tariffs than the normal tariffs, the importing countries determine unilaterally the eligibility criteria on countries and product coverage. In addition, they determine when to stop the preferential treatment.

It is worth comparing briefly the GSP Decision of 1971 and the Enabling Clause. The Decision contained detailed and explicit language concerning the availability of dispute settlement. The Clause, however, does not mention any exceptional circumstance, does not name any particular contracting party, and contains no waiver definition. On the other hand, while the Decision is, in legal terms, a waiver, the Clause is not a waiver from Article I of the GATT. The reason for the non-waiver

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<sup>3</sup> Its official name is the Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries.

<sup>4</sup> Jackson et. al. (2002, p. 1171).

nature of the Clause is that it does not refer to GATT Article XXV:5, which constitutes the waiver provision.<sup>5</sup>

GATT includes other Articles that provide special and differential treatment. Article XVIII of GATT allows developing countries to take trade-restrictive measures under three types of circumstances. Specifically, developing countries are allowed to restrict trade to promote infant industries, to protect the balance of payments, or to maintain a certain level of reserves. In addition, concerning trade negotiations, Article XXVIII *bis* (3) requires industrial countries to take into account the needs of developing countries for a more flexible use of tariff protection to assist their economic development and the special needs of these countries to maintain tariffs for revenue purposes. In other words, developing countries may not offer full reciprocity for negotiating concessions made by developed countries.

## **2. Post-WTO rules**

As a result of the Uruguay Round, WTO Members reached agreements on a variety of areas. Those agreements attach importance to the increasing participation of developing countries in world trade. Thus, most of them entail the special and differential treatment provisions in various forms. It is noted that the above-mentioned Articles of XVIII and Part IV of GATT still apply.

We can categorize the S&D treatment provisions of WTO Agreements into four groups. They are (i) permission of longer implementation period, (ii) giving special regards to needs of developing countries without practical value, (iii) technical assistance, and (iv) provision of substantive benefits. The provisions that fall under the first category include Article 15 of the Agreement on Agriculture, Article 27.3 of the Agreement on Subsidies and Countervailing Measures (Subsidies Agreement), Articles 10.2 and 14 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), Article 12.8 of the Agreement on Technical Barriers to Trade (TBT) and Articles 65 and 66 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

The second type of provisions include the preamble of the Agreement Establishing the World Trade Organization (the WTO Agreement), the preamble of the Agreement on Agriculture, Article 15 of Anti-dumping Agreement (AD Agreement) and Articles IV:3 and XIX:2 of the General Agreement on Trade in Services (GATS). In particular, the preamble of the WTO Agreement emphasizes the need for positive efforts to ensure that

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<sup>5</sup> Santos et. al. (2005, pp. 660-662).

developing countries secure a share in the growth in international trade commensurate with the needs of their economic development.

The technical assistance provisions include Articles 9.1, 9.2 and 10.4 of SPS, Articles 10.6, 11 and 12.7 of TBT, Article 20.3 and Annex III:5 of the Agreement on Customs Valuation and Article 3.3 of the Agreement on Preshipment Inspection. Article XXV:2 of GATS also emphasized technical assistance to developing countries. More importantly, Article 67 of TRIPS illustrates the types of technical assistance to be provided.

While many Agreements contain special and differential treatment provision, only a limited number of Agreements stipulate the substantive benefits. They are taken mainly in form of fewer obligations or more rights. Under Article 27 of the Subsidies Agreement, developing and the least-developed countries are subject to lower thresholds with respect to the countervailing duty investigations. For example, the lower *de minimis* subsidy margin<sup>6</sup> and the lower negligible volume of imports<sup>7</sup> apply to the allegedly subsidized imports originating in developing countries.<sup>8</sup> On the other hands, the Agreement on Safeguards (ASG) grants additional and more rights to developing countries. When the investigating authorities consider application of a safeguard measure, the negligible volume rule shall be applied to the imports originating in developing countries.<sup>9</sup> Moreover, while the maximum period of application of a safeguard measure is normally eight years, developing countries may apply the application for up to two more years.<sup>10</sup>

### **III. Policies for the development-friendly multilateral trading system**

#### **1. Assessment of the existing preferences**

There is no doubt about the fact that S&D treatment rules contributed to the economic development of developing countries. However, there have been arguments

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<sup>6</sup> While the *de minimis* subsidy margin for imports from developed countries is less than 1 per cent, those for imports from developing and the least-developed countries are 2 per cent and 3 per cent, respectively.

<sup>7</sup> While 3% and 7% rule applies to imports from developed countries, 4% and 9% rule applies to those from developing countries.

<sup>8</sup> When the investigating authorities find either that the subsidy margin is *de minimis* level or that the volume of imports in question is at and lower than the negligible volume, they shall terminate the countervailing duty investigations.

<sup>9</sup> 3% and 9% rule (Article 9.1 of ASG)

<sup>10</sup> Article 9.2 of ASG.

on whether the S&D rules achieved what were expected or intended when introducing those rules. Some studies pointed out limitations of preferential system under GATT/WTO with a view to giving a useful guidance for better rules. The limitations may be summarized in three parts: lack of well-defined, reasonable objectives, insufficient substances, and arbitrary application of preference, especially GSP.

As we analyze in the previous Section, a number of WTO Agreements provides a variety of special and differential treatment. But it is difficult to find out the well-defined, reasonable objectives for that S&D treatment is seeking. Rather, most of them do not specify objectives to fulfill through S&D treatment. While the Enabling Clause and some provisions mandate the developed countries to respond positively to the development, financial and trade needs of developing countries, they fail to suggest any measurable objectives. Even the Subsidies Agreement, one of a few Agreements that provide substantive preferences, states simply the importance of subsidies in economic development programmes of developing country Members.<sup>11</sup> Also some questions may be raised whether the longer implementation periods are appropriate for developing countries in the context of development, financial and trade objectives, though the needs are not specified clearly under WTO Agreements. Therefore, Members had difficulty to figure out how well the preferences operate in practice as well as to draw any valuable lessons from the practices.

Developing countries have claimed that they could get little or limited benefits under S&D treatment rules because most of the rules do not entail tangible substances full of vague terms. For example, Article 15 of AD Agreement stipulates that special regard must be given by developed country Members to the special situation of developing country Members. Moreover, the Article requires the developed country Members to explore possibilities of constructive remedies before applying anti-dumping duties where they could affect the essential interests of developing country Members. The Article, however, fails to give any specific guidance on the types of special regard to apply and the elements of constructive remedies.

Finally, there have been increasing concerns about the operations of GSP. Nobody can cast doubt to the contributions that GSP made to the trade expansion of developing countries. However, developing countries pointed out the discretion that the importing countries exercise in determining the eligible countries and product coverage. Certain developed countries including the European Union, link or try to link the preference level to the exporting developing countries' regulatory policies such as environmental and labor policies. Also questions were raised about the unilateral determination of

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<sup>11</sup> Article 27.1 of the Subsidies Agreement

graduation. Thus, the arbitrary application of GSP could undermine the intended purposes of the preferential system. In addition, WTO-consistency issue was raised in a dispute case with respect to the Enabling Clause. In particular, the issue in question was whether the MFN principle, one of the fundamental principles of WTO system, shall apply to granting GSP.<sup>12</sup>

## **2. Effective and operational S&D rules**

Here we would like to discuss policies that help to make S&D rules more effective and operational. Before touching upon the specific policies, it is worth discussing DDA mandate for S&D treatment. Under the Doha Ministerial Declaration, WTO members are required to seek to place needs and interests of developing country Members at the heart of DDA negotiations. The Declaration also emphasizes Members' will to make positive efforts designed to ensure that developing countries, especially the least-developed among them, secure a share in the growth of world trade proportional to the needs of their economic development.<sup>13</sup> Then, Members agreed to review all special and differential treatment provisions with a view to strengthening them and making them more précis, effective and operational.<sup>14</sup> Confirming the importance of technical cooperation and capacity building for economic development, Members stressed the urgent necessity for the effective coordinated delivery of technical assistance.<sup>15</sup>

Separately, the Committee on Trade and Development was instructed to carry out works related to S&D treatment provisions as part of implementation-related issues.<sup>16</sup> The works include to examine additional ways in which S&D treatment provisions can be made more effective and to consider ways in which developing countries, in particular, the least-developed countries, may be assisted to make best use of those provisions.

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<sup>12</sup> *European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries* (WT/DS246) (*EC-Tariff Preferences*).

<sup>13</sup> Paragraph 2 of the Doha Ministerial Declaration (the Declaration) (WT/MIN(01)/DEC/1, 20 November 2001).

<sup>14</sup> Paragraph 44 of the Declaration

<sup>15</sup> Paragraphs 38-41 of the Declaration address technical cooperation and capacity building.

<sup>16</sup> Paragraph 12.1 of the Implementation-Related Issues and Concerns (WT/MIN(01)/17, 20 November 2001).

## **(1) Objectives-based approach**

Under existing WTO Agreements, Members are simply encouraged or required to give special regard or special priority to the special economic situation and development, financial and trade needs of developing countries. Since these provisions do not require any specific commitments by developed countries, they have inherent limitations in fulfilling the intended purposes. Thus, to make a wide variety of S&D treatment effective and operational, there is a strong need to establish well-defined, reasonable and measurable objectives which reflect the special needs and concerns of developing countries. They include setting the numerical goals or thresholds. Then, if a developing country, the beneficiary of S&D treatment, reaches the pre-set goals, it would not be eligible for the preferences. Paragraphs 5 and 6 of Article 27 of the Subsidies Agreement provide a useful guidance. Under the provisions, if a developing country has reached export competitiveness in any given product, it shall phase out its export subsidies for such product(s) over two years.<sup>17</sup>

Other policy for the effective operation is introduction of criteria on determination of whether a country is a developing country or a developed country for the purpose of S&D treatment. Traditionally it is understood that whether a country is a developing country or a developed country has been determined by its self-claim. However, there is an increasing likelihood that the absence of objective country classification criteria impedes the effective operation of S&D treatment provisions.

In the event of implementing the Subsidies Agreement and the Safeguards Agreement, whether the country under investigation is a developing country or not is critical.<sup>18</sup> Neither Agreement specifies how to classify a country's status.<sup>19</sup> Thus, the lack of objective and reasonable classification criteria may lead to trade disputes which could have adverse effects on the multilateral trading system. Though it is not an easy work to develop the country classification guidelines,<sup>20</sup> reasonable and workable classification criteria are strongly recommended for effective working of S&D treatment rules. The possible elements of the criteria include the volume of trade, ratio of

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<sup>17</sup> It also stipulates the criteria on determination of export competitiveness, which shall be discussed further.

<sup>18</sup> Recognizing the fact that developing countries get substantive benefits under the Subsidies Agreement, Korea claimed that it is a developing country for the purpose of the Agreement in the middle of the Uruguay Round. In response to Korea's self-claim, the United States and the then-European Communities counterclaimed that Korea is not a developing country for the same purpose.

<sup>19</sup> The Subsidies Agreement treats certain countries as the least-developed countries in accordance with objective criteria stipulated in Annex VII.

<sup>20</sup> It is understood that the OECD Members discussed whether to introduce the country classification criteria and, if so, what kinds of criteria to be adopted for years.

volume of trade to GDP, share in the world trade and export and growth rate.

Finally, to make S&D treatment sense, we need to adopt the institutional approach. The approach sets policy objectives that could become basis for improved institutions in developing countries concerned. Then, the developing countries shall make efforts to achieve the objective(s) to be eligible for S&D treatment. What kinds of institutions are appropriate is subject to discussion. But the institutions or policy objectives to be considered include appropriate protection of property rights, regulatory institutions, institutions for macroeconomic stabilization, for social insurance and for conflict management.<sup>21</sup> Also we may link the preferences to some regulatory policies such as environment and competition whose issues have been put on the table of multilateral trade negotiations.

## **(2) More and better substances**

As we point out in the above, one of the main problems of the existing preference provisions is the lack of substantive elements. To make those provisions effective and operational, WTO Members shall discuss how to fill the provisions with actions rather than rhetoric. Though most WTO agreements contain S&D treatment provisions, we focus our analysis on the Anti-Dumping Agreement, the Subsidies Agreement and DSU with an aim of exploring the substantive S&D treatment provisions.

### **(a) Anti-Dumping Agreement**

Since WTO developed country members have impose anti-dumping measures on imports from developing countries,<sup>22</sup> developing countries have expressed deep concerns about the developed countries' allegedly abusive use of anti-dumping measures. One of the reasons for the frequent imposition of those measures against developing countries is that S&D treatment provision of the AD Agreement does not secure any substantive benefits for them.

Thus, we would like to make policy recommendations for the substantive S&D treatment under the AD Agreement. First, the *de minimis* dumping margin shall be differentiated, depending upon the level of development. Under Article 5.8 of ADA, a single *de minimis* dumping margin of 2% applies, regardless of the exporting country's

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<sup>21</sup> Rodrik (2002).

<sup>22</sup> China is the most target country of anti-dumping measures. During the period of 1995-2005, Chinese exports have been subject to 469 anti-dumping initiations out of total 2,840 and 338 anti-dumping measures out of total 1,804. The second most target country is Korea.

status.<sup>23</sup> In other words, when the investigating authorities examine whether the allegedly dumped imports shall be exempted from anti-dumping measures on the basis of *de minimis* dumping rules, they do not give special regards to imports from developing countries. Thus, we recommend that while the existing 2% *de minimis* dumping margin rule shall apply only to the allegedly dumped imports originating in developed countries, the higher *de minimis* dumping margin, say 3%, shall be applied to products under investigation from developing countries. Moreover, it is desirable to apply much higher *de minimis* dumping margin rule, say 5%, to imports originating in the least-developed countries.

The second substantive element of S&D treatment under ADA is the differentiated and higher thresholds of negligible volume of imports. Under Article 5.8 of ADA, the investigating authorities shall terminate the anti-dumping investigation if the volume of dumped imports from a particular country is found to account for less than 3 per cent of imports of the like product in the importing Member, unless countries which individually account for less than 3 per cent of the imports of the like product in the importing Member collectively account for more than 7 per cent of imports of the like product in the importing Member. This negligible volume rule applies to the imports regardless of whether the exporting country is a developing or developed country. Thus, to give special regard to developing countries, we recommend that the higher thresholds for negligible volume determination shall be applied to the dumped imports from developing countries, say 4% and 9%, respectively. Then, this preferential rule is expected to increase likelihood that developing countries are free from the anti-dumping measures. In turn, their trade needs will be more likely to be met.

The other recommendations concerning S&D treatment under ADA include the mandatory application of lesser duty and public interest, and stricter application of facts available provision. Article 9.1 of ADA provides that the anti-dumping duty could be less than the dumping margin if lesser duty would be adequate to remove the injury to the domestic industry. But currently the investigating authorities are not required to apply the lesser duty even in circumstances where the lesser duty is justified. The lesser duty implies reduction of burden on the exporters and then their countries. Thus, if the lesser duty rule is mandatory at least for imports originating in developing countries rather than discretionary, those countries could get benefits in the form of lower anti-dumping duty.

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<sup>23</sup> *De minimis* dumping margin is the maximum allowable level of dumping margin whose imports are not subject to imposition of anti-dumping measures. Thus, when the dumping margin found is found to be less than 2%, the investigating authorities shall terminate the anti-dumping investigation.

Concerning the public interest rule, ADA does not address this issue at all. It is widely understood that main purpose of anti-dumping measures is to protect solely the interests of domestic producers of like product of the dumped imports. On the other hand, the investigating authorities in general do not take into account the interests of domestic consumers, which would be affected adversely by the imposition of anti-dumping measures. Thus, if the investigating authorities are required to consider interests of domestic industry as well as those of domestic consumers<sup>24</sup> in determining the amount of anti-dumping duty for dumped imports from developing countries, the level of anti-dumping duty is in general expected to decrease. Then, the lower anti-dumping duty would provide benefits for developing countries.

Next, we analyze substantive S&D treatment policies concerning the facts available<sup>25</sup>. Under the AD Agreement, when any interested party, mainly the exporting companies, refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the anti-dumping investigation, the investigating authorities may make preliminary and final determinations on the basis of facts available. When the authorities make dumping determination on the basis of facts available, it normally leads to higher anti-dumping duty.<sup>26</sup> Moreover, recognizing that when and how to apply the facts available could result in substantial differences in determinations, WTO members agreed to stipulate details in a separate Appendix. There, however, is still much room for investigating authorities to exercise discretion that, in practice, results in higher dumping margin and then higher anti-dumping duty level. Thus, exporting countries are deeply concerned about the discretionary power of investigating authorities with respect to whether to apply the facts available and what kinds of facts available to use.

Recognizing the adverse effects of the facts available on the amount of anti-dumping duty, developing countries attach more importance to this issue with a hope of improving the rules for applying the facts available. In some sense, developing countries are vulnerable to the application of the facts available mainly because they encounter difficulties in maintaining accounting information and other information, that are deemed necessary to determinations, due to their limited financial and human resources. Also some of developing countries' failures to provide necessary

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<sup>24</sup> Domestic consumers include general consumers and industrial users of the product under investigation..

<sup>25</sup> The terms of "facts available" and "best information available" are used interchangeably under ADA.

<sup>26</sup> The main reason for the consequential higher anti-dumping duty is that primary sources of the facts available used are the facts contained in the application for the initiation of the investigation by the domestic industry.

information, in part or as a whole, result from the relatively less-developed socio-economic system such as lack of well-defined accounting system and inadequate legal system. Thus, we recommend that stricter facts available rules shall apply to investigation of the allegedly dumped imports from developing countries, taking into account difficulties in providing necessary information requested.

For example, longer period for submitting requested information could be allowed for the exporters of developing countries.<sup>27</sup> To minimize the room for discretion by the investigating authorities, objective criteria shall be introduced with respect to determination of non-cooperation<sup>28</sup> which permit use of the facts available. Also developed country Members are required to spell out in their domestic anti-dumping regulations exemptions for developing countries concerning determination of non-cooperation<sup>29</sup>. More importantly, the investigating authorities shall distinguish the cases where the developing countries' companies under investigation *do not* provide necessary information requested and ones where they *cannot* do it. Thus, they shall apply the facts available rules in a differentiated manner in favor of developing countries with a separate facts available provision in ADA.<sup>30</sup>

## **(b) Subsidies Agreement**

As the Subsidies Agreement recognizes, subsidies may play an important role in economic development programmes of developing countries. Thus, in contrast to other Agreements, the Agreement contains a number of substantive S&D treatment provisions mainly in Article 27. The preferential provisions include higher thresholds for *de minimis* subsidy margin, longer implementation periods and the more specific rule for negligible volume of subsidized imports. However, we are of the view that while most of the existing preferential provisions under the Subsidies Agreement are

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<sup>27</sup> Currently at least 30 days are given for reply with a possibility of extension of maximum 30 days regardless of whether the exporting country is a developing country or a developed country.

<sup>28</sup> Under ADA, there are three situations that could be considered as non-cooperation: (i) where exporters or producers in the exporting countries refuse access to necessary information, (ii) they fail to provide necessary information within a reasonable period, and (iii) they significantly impede the anti-dumping investigation,

<sup>29</sup> When the exporters or producers under investigation refuse access to, or otherwise do not provide, necessary information within a reasonable period or significantly impedes the anti-dumping investigation, the investigating authorities consider the situation as non-cooperation with respect to their investigation and then could use the facts available in determining dumping margin

<sup>30</sup> Article 6.13 of ADA provides that the investigating authorities are required to take due account of difficulties experienced parties, especially small companies, in supplying information requested, and that they are required to provide any assistance practicable. But, ADA does not specify what might constitute practicable assistance.

related to the countervailing duty investigations, the Subsidies pays little attention to preferential provisions concerning how to operate the subsidy programmes. Thus, we would like to make recommendations focusing on the subsidy programmes which are deemed instrumental to economic development of developing countries. It is noted that we also recommend substantive S&D treatment for the countervailing duty investigations.

First, we would like to make policy recommendations concerning non-actionable subsidies. Though Part IV of the Subsidies Agreement<sup>31</sup> elapsed at the end of 1999, since WTO Members are mandated to discuss non-actionable subsidies as one of implementation-related issues during DDA negotiations,<sup>32</sup> it is meaningful to use the non-actionable subsidies provisions as a basis for the future works. Under Article 8 of the Subsidies Agreement, three types of specific subsidies<sup>33</sup> are permitted when they meet certain conditions. They are (i) research and development subsidies, (ii) regional development subsidies and (iii) environmental subsidies.<sup>34</sup> For example, regarding research and development subsidies, governments are permitted to support up to 75% of the costs of industrial research or up to 50% of the costs of pre-competitive development activity without giving any special regard to developing countries. Thus, recognizing that research and development activities are vital to sustainable economic development and that developing countries are far behind developed countries in those areas, it is highly recommended that developing countries be permitted to support higher portion of the R&D costs incurred than that for developed countries. Also concerning the regional development subsidies, higher income and lower unemployment rate criteria<sup>35</sup> may apply to subsidy programmes in developing countries.

There are two policy recommendations regarding the environmental subsidies. First, more than 20% of the cost of adaptation shall be permitted. Second, the support coverage shall be expanded. While only cost for adaptation of existing facilities to new environmental requirements is covered under Article 8, developing country governments shall be allowed to cover the cost of replacing and operating the assisted investment as well to promote the relatively low level of environmental protection in those countries. Finally, we note that under DDA negotiations, WTO Members are

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<sup>31</sup> Part IV constitutes Article 8 and 9 under the title of non-actionable subsidies.

<sup>32</sup> Paragraph 10.2 of Implementation-Related Issues and Concerns (WT/MIN(01)/17, 20 November 2001).

<sup>33</sup> If a subsidy is in general deemed to be specific within the meaning of Article 2 of the Subsidies Agreement, it may be subject to disciplines. But if a subsidy programme is not specific or generally available, it is free from disciplines.

<sup>34</sup> These terms are not official terms, but they are used for convenience.

<sup>35</sup> Under the defunct Article 8.2(b), they are 85% and 110%, respectively.

required to explore the lapsed non-actionable subsidies with a view to achieving legitimate development goals. The goals include regional growth, technology research and development, and environmental protection and improvement.

Second, we recommend a number of S&D treatment rules concerning the countervailing duty investigations. First, more time shall be allowed for consultations<sup>36</sup> in the event that subsidy programmes in developing countries are subject to a countervailing duty investigation. The reason for the recommendations is that since developing countries face limited trade-related human and financial resources, they have difficulties in preparing for the consultations in time and well at which they can defend the claims by the domestic industry of importing country. Thus, it is reasonable to allow more time for developing countries such that they can prepare for consultations well. A separate preferential provision on the facts available shall be added.

### **(c) DSU**

DSU contains a number of provisions that give preferential treatment to developing countries. They are related to consultations and panel procedures involving both a dispute brought by a developing country Member against a developed country Member<sup>37</sup> and a case brought against a developing country Member<sup>38</sup>. Also where one or more of the parties 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 for part of the covered agreement<sup>39</sup> which have been raised by the developing country Member in the course of the dispute settlement procedures.<sup>40</sup> Also the legal experts of the WTO Secretariat may be available for developing country Members upon request.<sup>41</sup> However, it is difficult to find provisions that provide substantive preferences for developing countries. Thus, we explore development-friendly policies for DSU that

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<sup>36</sup> Under Article 13 of the Subsidies Agreement, the exporting country government entitles to request for consultations before the initiation of any investigation. In practice, they are very important and useful opportunities for the exporting country governments to defend the claims by the domestic industry of importing country, which could affect path of investigations and outcome of determinations.

<sup>37</sup> Article 3.12 of DSU.

<sup>38</sup> Article 4. 10 of DSU.

<sup>39</sup> The term of the covered agreements means the agreements to which DSU applies. They are listed in Appendix I to DSU and include the WTO Agreement, Multilateral Trade Agreements and Plurilateral Trade Agreements.

<sup>40</sup> Article 4.11 of DSU.

<sup>41</sup> Article 27.2 of DSU.

provide the developing countries with differential and more favorable treatment.

First, we recommend compensation for the damage which developing countries suffer due to the developed countries' WTO-inconsistent measures. Developing countries are more likely to be vulnerable to developed countries' WTO-inconsistent measures because the developing countries are relatively more dependent on the developed country markets. However, even when a Member's measure is found to be inconsistent with WTO agreements at issue, there is no requirement for the complained party to compensate for the loss or damage that the complaining party suffered during the period from the introduction of the measure to the implementation of DSB's recommendations and rulings in conformity with the relevant agreements.

Arguably the absence of compensation requirement could lead to abusive use of contingency protection and other types of trade restrictions, especially by the developed countries. This non-existence of compensation requirement is of special interest to developing countries. Also there is a high likelihood that the developing countries become victims of the loopholes of DSU. Thus, to ensure that the developing countries could achieve sustainable development through trade liberalization, we suggest that when certain measures by developed countries are found to be inconsistent, the developed countries are required to compensate for the loss that the complaining developing countries suffer during the whole period where the WTO-inconsistent measures have been imposed.<sup>42,43</sup>

Second, to provide more effective remedies for developing countries, we recommend that more remedy options be available to developing countries when they become complaining parties. Under DSU, in the event that the complained party does not implement the DSB's recommendations and rulings within a reasonable period of time, the measures available to the complaining party are compensation and the suspension of concessions or other obligations.<sup>44</sup> While compensation is voluntary,<sup>45</sup> the suspension becomes binding after an arbitrator determines the level of suspension and then the DSB grants authorization to suspend.

However, it has been observed that some developing countries had difficulty in utilizing their rights to suspend against the industrial countries which fail to bring the measure found to be WTO-inconsistent in compliance with the recommendations and

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<sup>42</sup> WTO Members shall develop a reasonable method to calculate the loss. Alternatively, an arbitrator may determine the amount of loss.

<sup>43</sup> In 1965 developing countries proposed monetary compensation for damage, but developed countries opposed the proposal. However, during the period from mid-1980s to 1994, seven GATT panels ordered antidumping or countervailing duties which were found in violation of GATT rules. (Hudec, 2002, p. 85).

<sup>44</sup> Article 22.1 of DSU.

<sup>45</sup> Article 22.1 of DSU.

ruling with the reasonable period of time. The primary reason for the difficulty result from the structure of their economies which are highly dependent upon the industrial countries. Thus, even when they are authorized to suspend their concessions or obligations, they hesitate to take retaliatory actions against non-conforming developed countries. But the opposite does not hold. Therefore, there is a need to permit more effective remedies for the complaining developing countries in the event of the complained developed country's failure to comply with the DSB's findings and recommendations.

Recognizing the need for effective and practical remedies for developing countries, we suggest that compensation shall be mandatory rather than voluntary. Moreover, the complained developing countries entitle to choose a remedy between retaliation and the mandatory compensations.<sup>46</sup> In other words, if the developing country concerned decides to seek for compensation instead of suspension, the complained developed country shall provide compensation. It is noted that compensation here is different from one in the previous subsection. While the former is for damage occurred due to the complained developed country's failure to comply to DSB ruling within the reasonable period of time, the latter is for the loss from that the complaining developing country suffered during the period from the time to impose the WTO-inconsistent measures to the end of implementation period.

Third, we recommend more discretion for developing countries with respect to suspension. Article 22.3 of DSU stipulates the principles and procedures concerning what concessions or other obligations to suspend. In particular, the complaining party should first seek to suspend concessions or other obligations with respect to the same sectors(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment. If the complaining party considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations in other sectors under the same agreement. However, if the complaining party considers that it is not practicable or effective to suspend concession or obligations wit respect to other sectors under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement.<sup>47</sup> Thus, the complaining party shall seek the effective retaliatory measures step by step.

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<sup>46</sup> In 1965 Developing countries had proposed collective retaliation by developing countries against the developed countries. The rationale for this proposal was that individual developing countries could not impose sufficient retaliation to cause noticeable pain in larger developed countries. Developed countries strongly opposed this proposal. (Hudec, 2002, p. 86)

<sup>47</sup> This type of suspension is called as cross-retaliation.

However, with a view that giving the developing countries more remedy options could refrain the developed countries from introducing the WTO-inconsistent measures, we make a suggestion that the complained developing countries are permitted to choose one of the above-mentioned three options for elements of suspension rather than to follow procedures step by step. As a result, this policy could help the developing countries meet their development, financial and trade needs. It could be argued that this policy recommendation of more discretion for the elements of suspension does not bring substantive benefits to developing countries. On the other hand, to ensure that DSU applies in an objective and reasonable manner, we may impose additional condition that requires the developing country concerned to demonstrate that the subject sector or agreement for suspension is vital to it or of trade interest to it with a view to eliminating or at least reducing the possibility of political motives behind the retaliatory actions.

### **(3) Improved GSP**

Recognizing the problems of unilateral and arbitrary application of GSP, there is a need to introduce a multilateral or plurilateral rules on eligible countries and products, and graduation. If those objective and reasonable rules are established, developing countries could set longer-term economic policies with more certainty over the future path of GSP. In 1989, the United States announced abruptly termination of GSP for Hong Kong, Korea, Singapore and Taiwan despite the fact that at that time their income level did not reach US\$8500 per capita, the income level at that GSP is not provided. In addition, there is a need to discuss whether to allow the level of preferences to be linked to regulatory policies which are deemed to have little relation to trade.

Some countries tend to link the level of preferences to behind-the-border measures. For example, the European Union considers the beneficiary country's environmental and labor policies in determining the level of preferences. Since none of WTO agreements provide comprehensive rules on any of behind-the-border measures, it is in urgency to establish guidelines on whether to permit to link trade preferences to regulatory policies with a view to securing the trade preferences initially intended under the multilateral trading system.

## **IV. Concluding remarks**

We discuss the limitations of the existing special and differential treatment rules under WTO system. Most of them do not in common have substantive elements. Thus, we explore policies for substantive and effective S&D treatment with a view to making the world trading system more development-friendly. If the more development-friendly trading system is realized, more developing countries will participate in world trade and in turn lead to further trade liberalization. Then, it is more likely that development, trade and financial needs of developing countries will be met. Our policy recommendations constitute three parts: objectives-based approach, more and better substances and improved GSP. In particular, we discuss in detail the substantive S&D treatment for the Anti-Dumping Agreement, the Subsidies Agreement and the Dispute Settlement Understanding. Therefore, we would like to stress our view that when those policy recommendations are in place, the multilateral trading system would be strengthened.

However, several important issues remain untouched which could be discussed for the future works. The first issue is how to provide technical assistance for developing countries, with special regard to the least-developed countries. It is also important to figure out how to help developing countries build up their capacity. The second issue is how to design the S&D treatment framework that link the extent of preferences to the types of incentives for the preference providing countries. Third, as the importance of trade in services in world trade has increased, developing countries also attach importance to trade in services. But the General Agreement on Trade in Services (GATS) contains little substantive elements of S&D treatment. Thus, there is a need to explore improved S&D policies in trade in services. Mode 4 could be one of the areas which are of substantial interest to developing countries. Finally, as the regional integration processes have been accelerated, the extent of preferences for developing countries has fallen. Thus, we may discuss and design ways to overcome eroding preferences under the wide web of economic integration.

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