Strengthening Development in the WTO:
A Theoretical View with Practical Implications

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1. Introduction

The starting point of this paper is that international rules combine both legal and political aspects. A famous dictum in international law states that most nations obey international obligations most of the time (see e.g., Henkin 1968). This indicates that law and politics do not necessarily oppose each other. However, sometimes they do. The potential conflict between law and politics is derived from their very natures, which are different. Law represents predefined guidelines, prescribes certain actions and defines what is and is not allowed, while politics represents a rather \textit{ad hoc} view of how a given situation should be dealt with. As an example, according to international law treaties must be observed, but seen through political lenses they do not have to be observed by default or all of the time.

Faced with this dilemma, most international treaties are hedged with exceptions, escape clauses or room for maneuver, within which states can act freely without violating the rules. These forms of flexibility may be included in the way a treaty’s provisions are formulated. More specifically, although treaties are legal documents which are binding on their signatory states, not all of their provisions are necessarily obligatory or legally binding. Many of them are expressed in vague terms or as so-called ‘best-endeavor clauses’, soft law or non-binding statements (Abbott and Snidal 2000; Shelton 2006). This is case with the way the WTO rules dealing with developing countries’ special needs and status are drafted. These rules permit different treatment of developing countries: for example developing

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countries can be treated more favorably, and they are not required to follow the general reciprocity norm in the WTO. Since the WTO is basically a legal agreement, these rules are also stated, structured and introduced as legal norms and provisions, the so-called 'Special and Differential Treatment' (S&DT) provisions. More explicitly, S&DT provisions are those WTO provisions that specifically and explicitly relate to a subgroup of WTO members. Developing countries or Least-Developed Countries (LDC) are the usual target groups for S&DT, but other groups can be Small and Vulnerable Economies, Land-locked Countries, Small Island Countries, and Net Food-Importing Countries. In essence, by encouraging, permitting and defining special and differential treatment for developing countries, the S&DT provisions add flexibility to the WTO, however mostly through non-binding and unclear provisions.

Although treaties are legal agreements, contain legal rules and provisions and regulate the issues they deal with, they exist in a political context which means that often they are drafted as frameworks for action and contain a degree of flexibility. The framework established by a treaty does not necessarily state exact instructions for actions, but establishes a spectrum within which acts are permitted. As I will argue below, the level of flexibility in a legal treaty or provision can be analyzed in accordance with three parameters: obligation, precision and coherence.

The conflict between law and politics and the inherent flexibility of treaties may give rise to disputes between the signatory states over the interpretation of provisions, what the treaty is actually saying, how it should be understood and acted upon, and what actions are and are not allowed. Thus a central element of treaties is the way they settle disputes between signatory states. Generally speaking, two forms of dispute settlement systems can be identified: political and judicial. However, many dispute settlement systems, for example the WTO's DSM, contain elements of both. A political dispute settlement system emphasizes negotiations between the disputing parties and encourages compromise. A judicial dispute settlement system, on the other hand, is based on a neutral examination of the facts of the dispute, often by a third party, who tests them against a set of pre-defined rules and then rules on the conformity (legality) or non-conformity (illegality) of the disputed matter with the applicable rules (Merrills 1998; Sandholtz and Stone Sweet 2004; Robles 2006). Since many rules, such as the S&DT provisions, are drafted in an imprecise manner, judicial dispute settlement organs have to interpret the rules. These interpretations may fill gaps in the system, clarify the meaning of certain provisions or in extreme cases make new or additional rules. Through these interpretations, judicial dispute settlement organs are central in developing the systems they are designed to serve.

Different judicial dispute settlement organs have different approaches to the performance of their duties and are subject to different levels of restriction. As an example, in many cases, the European
Court of Justice (ECJ) interprets the rules in a freer manner than the WTO's panels and the Appellate Body, which is more literal in its approach to the interpretation of the WTO rules. An example here is the ECJ's rulings on the free movement of goods. These rulings have been based on the goal of the EU, which is to establish a common market. In this regard, the ECJ has interpreted the rules to further this goal, even though in some cases the rules have not been clear or are silent on some matters (see e.g. Craig and de Burca 2003: Ch. 14-15).

Effectiveness of the S&DT provisions
Regardless of the existing S&DT provisions in the WTO and the system's aim to assist developing countries to participate more equally in the trading system and the organization, as I show below, the WTO judicial bodies have so far not interpreted the invoked S&DT provisions in such a way that they have granted developing countries any real advantage. In this regard one has to ask one important question: why should we expect the S&DT rules to be effective in the first place?

The answer to this question is threefold. First of all, they should be effective since they exist and the reasons for their existence are still valid. Namely, the WTO as a global organization, recognizing the heterogeneous nature and status of its members, must be a place where all its members can use the system and opportunities it offers. Here the S&DT performs the function of minimizing the asymmetrical level of WTO member countries' available resources.

Second, the S&DT provisions provide weaker countries with some assistance in using the system. This is one of the goals that can be found, inter alia, in PART IV of GATT. Article. XXXVI.9 reads 'The adoption of measures to give effect to these principle and objectives <recognizing the special economic and social needs of developing countries and assisting them to through trade raise their standards of living> shall be a matter of conscious and purposeful effort on the part of the contracting parties both individually and jointly'. Thus, one should expect that those rules, the S&DT provisions, that are meant to operationalize development as a legal norm should be effective.

Thirdly, and arguably even more importantly, S&DT provisions legitimize the international trading system as institutionalized in the WTO as a truly global system. In other words, WTO as an organ solely for the main actors and solely used by them cannot be a global player. Thus, S&DT provisions have to be effective. This issue is also recognized by WTO member states, who in countless statements and even in paragraph 44 of the Doha Declaration state that:

'We reaffirm that provisions for special and differential treatment are an integral part of the WTO Agreements. We note the concerns expressed regarding their operation in addressing specific constraints faced by developing countries, particularly least-developed countries. In that
connection, we also note that some members have proposed a Framework Agreement on Special and Differential Treatment (WT/GC/W/442). We therefore agree that all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational. In this connection, we endorse the work programme on special and differential treatment set out in the Decision on Implementation-Related Issues and Concerns.’

Here it should be mentioned that encouraging developing countries’ participation in the trading system happens on various fronts, and by many actors, both states and non-state actors such as the Advisory Centre on WTO Law (ACWL), which was established to assist developing countries in their participation in the DSM and has been successful in this regard.

2. The Theory

As indicated above, although treaties are legal documents which are binding on their signatory states, they exist in a political context and often they are meant to achieve political goals. Thus they shall be analyzed though a combination of political theories and legal methods and insights. Regime theory which is the basic theory used in this paper performs this task. The first reason for this choice is that regime theory recognizes the importance of rules in international relations. Next, since the subject of this study is legal rules and systems, and since regime theory can be used together with theories on these issues, there is a sound basis for linking up with theories explaining legal issues. Third, since the primary focus of this paper is the S&DT rules as an issue area under the WTO regime, the chosen theory must explain an issue area.

Regime theory’s units of analysis are the bricks that form international affairs, namely issue areas. In essence, issue areas define the scope of a regime. Traditionally issue areas have been regarded as the problems which regimes are established to manage or solve. That said, in our complex world where issues are increasingly interconnected, the task is to isolate an issue. In formal regimes this task is achieved through negotiations and the result is expressed in the regimes’ rules, which define their scopes and their issue areas. As such a regime may have several sub-regimes (Young 1996; Hasenclever, Mayer et al. 1997), I isolate S&DT provisions in this book as the rules defining a sub-issue in the WTO, namely developing countries’ special needs and status in the WTO system, knowing that this issue is linked to the other parts of the organization and in a broader term to the whole international trading and economic system. Arguably, this sub-regime could also be divided in more detailed regimes, such as waivers and the rules dealing with implementation of the obligations. However, all these detailed issues have one thing in common: they relate to the special status of developing countries in the WTO. As such, I will regard them as one issue area and accordingly one regime.
This brings me to the final reason for choosing regime theory: it is capable of mapping an issue area and placing its rules in a normative context, thus making it possible to study changes within an issue area and identify their strengths as well as their shortcomings. This feature of regime theory can also be used to compare different regimes.

Regime theory
Generally speaking, regime theory in its pure form describes rule-based intergovernmental cooperation. Regimes were first defined by John Ruggie in 1975 as 'a set of mutual expectations, rules and regulations, plans, organizational energies and financial commitments, which have been accepted by a group of states'. Later, at an international conference, the definition of a regime was discussed, leading to Stephen D. Krasner formulating a definition which has influenced subsequent discussions. According to this definition, regimes are sets of 'implicit or explicit principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given area of international relations. Principles are beliefs of fact, causation, and rectitude. Norms are standards of behaviour defined in terms of rights and obligations. Rules are specific prescriptions or proscriptions for action. Decision-making procedures are prevailing practices for making and implementing collective choice' (Krasner 1983: 2).

During the 1980s scholars used realism and functionalism along with regime theory to analyze how and why regimes are formed. Accordingly, two schools of thought developed. The first school, that of the regime realists, argued that regimes reflect the relative share of states’ power (see, e.g., Krasner 1985). The second school, that of the rationalists, argued that regimes perform central and important functions, which makes them desirable to establish and maintain (Keohane 1989).

Since the late 1990s and due to the ever-increasing number of international organizations and agreements between states, regime theory has experienced a revival and a third school has emerged, the constructivist school. The focus of this new wave of research has been on regimes as social constructions or institutions. This line of enquiry looks at how norms and rules are formed and how they in their turn form actors’ identities and understandings of a particular issue area (see, e.g., Wendt 2001). Recently, yet another line of enquiry based on regime theory has emerged. This time regimes are regarded as legal arrangements. This paper is in line with this view.

The legal approach
Influenced by the constructivist school of regime theory, legal scholars were the first to link international law with international relations (Kratochwil 1989; see, e.g., Arend 1999; Kratochwil 2000).
Some scholars see the law and rules as social constructions that are always in the making and can, for example, be used in actors’ arguments. This body of mainly theoretical work has focused on answering some basic questions, such as what a legal system is, what role international law plays in international politics, how rules are interpreted, and how international law evolves. Others adopt a more practical and empirical approach, analyzing the different types of rule in different regimes, including constitutive regimes (Arend 1999).

The legal approach offered in this paper focuses on the role of legal rules in defining and regulating an issue area and making it flexible. Accordingly, S&DT rules are regarded as forming the backbone of a development regime which defines and regulates developing countries’ special status in the WTO.

The legal approach regards legal regimes as having two elements: normative and operative. The normative elements express the goals of the regime and the reasons for its existence. Usually they are found in the preamble of the treaty establishing the regime. In a regime, norms are operationalized by the rules defining how the regime will achieve its goals and the rulings of the regime’s dispute settlement organs, if such organs exist. The operative element of a regime consists of these two sources. Legal systems and their rules can be examined along three variables: obligation, precision and coherence. These three parameters define why a legal regime or a legal rule functions as it does. Thus, they can be used to analyze regimes on a systemic level and to analyze regimes' single provisions or concepts.

Obligation is measured and observed in how a rule is formulated as either a binding and mandatory provision or a non-binding and declaratory norm. Accordingly, norms are closer to “soft laws”, rules to “hard laws”. One traditional understanding of the law asserts that a legal provision is either binding or non-binding. However, in politico-legal systems, such as the WTO, a provision may be placed between these two poles. One example illustrates this: In order to have an objective dispute settlement system, a provision can state that all parties to a dispute shall provide any requested information to the judges and mandate disputing parties to cooperate with the judges unconditionally. This provision is binding, and if any party does not provide the requested information, it is in breach of the provision. A non-binding provision, on the other hand, may state that all parties may provide any requested information to the judges. This provision is not binding, since it is up to the disputing party to decide whether it wishes to provide the requested information or not. And if it decides not to do so, it is not breaching the provision. In between these two examples – is a third, more common example: a provision that disputing parties should assist the judges to perform its tasks. This provision is neither binding nor non-binding, first of all because it says “should” and not “shall”, a stronger term. Secondly and most importantly, any party can claim that it is assisting the judges, even when it is actually not. In such
situations the other party may ask the judges to investigate, or the judges may themselves be empowered to examine the party’s compliance or non-compliance with the provision. For simplicity sake I call this type of provision a “grey provision”.2

Obligation is linked to the second parameter, namely precision. Precision is measured by assessing how clearly a provision is formulated. A provision can define exactly its notion, or it can be descriptive and merely raise an issue. The former is precise, while the latter is considered imprecise. In the above-mentioned task in my example, one should ask what facts are. This depends on the context of the system and how it is institutionalized. In my example, apart from being binding, the above example of a binding provision is also clearly formulated. It says that the parties shall provide all information that the judges request (in order to act objectively and determine the facts, no matter what facts and objectivity might mean). Here the terms “shall”, “all” and “upon request” are the keywords, and they cannot be disputed by any party. Furthermore, they provide the normative elements of the system with some operative elements, thus making it work. Even here, however, it can be disputed when the information should be provided, and how. As an example, if time is of great importance, a disputing party may try to delay the process by not providing the information promptly. In other cases, the delay may not be caused by a party acting in bad faith, but because it may need some time to collect the information.3

This example is not precise on how information is to be provided. As an example, a party may argue that all the requested information is available on the internet and that the judges have non-restricted access to it. However, the information found there may be in a language which is only spoken by five million people. This would mean that it is up to the judges actively to collect the requested information and translate it. In other cases, a party may prepare a dossier of requested information in an official WTO language and pass it to the judiciary bodies. The point here is that only a very few provisions, if any, regardless of how binding they are, can be regarded as fully precise.

One way of dealing with imprecise provisions is to empower the judges to interpret the raised provisions in their rulings. This is also the case in the WTO. In short, although a provision may seem precise, it can never anticipate all circumstances and fully give instructions in all potential situations. Thus the question is not whether a provision is precise or not, but how precise or imprecise it is. Case law is the best place to find how precise or imprecise a provision can be.

Another way of making a provision precise is to link its central notions to other provisions or define them elsewhere in a treaty. This issue is coherence, which relates to how the links between provisions and links between the normative and operative components are established. As such,

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2 Grey provisions and soft law are not necessarily identical. Soft law usually constitutes non-legal agreements, while a gray provision is part of a legal arrangement.
3 See Chayes and Chayes (Chayes and Chayes 1995).
coherence relates to whether a system has some inherited contradiction or whether the operative and normative elements support each other. In this regard it is important how the system is organized and managed, including its decision-making and dispute-settlement procedures.

As an example my grey provision can be followed by two other provisions: One stating that the aim of the system is to be objective and one stating that the judges’ task is in particular to investigate the facts of the case based on all available evidences, and the parties have to provide the judges with all available information to this end and in a timely manner. In this case, these additional provisions not only define what the judges’ primary task is and why, but also it obliges parties to provide all the available facts, and not only those that the judges request. As such, it can be argued that these three provisions together have a stronger legal standing than the binding provision mentioned above on its own. Here it shall be mentioned that the difference between coherence and precision is that, while precision refers to how a legal notion is defined in a provision, coherence relates to how the notion is put into a system and linked to other notions.

In short, normative and operative elements, and obligation, precision and coherence, are interrelated concepts, which can complement, strengthen or weaken each other. How they can be identified in a provision depends on its context.

In the next parts, the presented theory is used to answer the following questions: How are the S&DT provisions formulated? Do they constitute a coherent system? Why are they interpreted as they are? Why have the S&DT provisions not been more successful in assisting developing countries in the dispute settlement process? And most importantly how they can be strengthened?

3. S&DT Regime

Since the 1960s, and as a response to developing countries’ demands, many S&DT provisions were introduced into the GATT, and the WTO contains more than 140 S&DT provisions spread across all its covered agreements, including the DSU. Furthermore, the importance of the S&DT provisions for developing countries and the trading system has frequently been proclaimed in the WTO and during negotiations surrounding it, such as the Doha Declaration. We also saw that five different types of S&DT provisions can be found in the WTO:

1. Better access to developed countries’ markets, e.g. the Enabling Clause;
2. Relaxing the criteria for developing countries to comply with WTO rules, e.g. Article 27.2a of the Agreement on Subsidies;
3. Rules instructing other members or WTO organs to safeguard the interests of developing countries, e.g. Article 15 of the Anti-Dumping Agreement;
4. Transitional periods in implementing the general rules, e.g. Article 65.2 of the TRIPs;
5. Technical assistance to developing countries, e.g. Article XXV.2 of the GATS.

In general, these provisions have three main functions, which can be regarded as their general aims:
   a) Assisting developing countries in increasing their involvement in world trade;
   b) Assisting developing countries in using the system itself; and
   c) Enabling developing countries to implement the agreements by recognizing their special needs.

Generally speaking, S&DT provisions can be regarded as exceptions to the general WTO rules. As such, they may seem a potential conflict of norms. On the one hand, as a rule-based system, the WTO treats its subjects as equal units. On the other hand not all countries are equal, and usually a legal system has some provisions which aim at neutralizing differences in parties’ abilities to access the system. Since one of the main goals of the WTO is to involve developing countries in the organization and in the trading system *per se*, this dilemma has been dealt with through several S&DT provisions, which are meant to take into account the problems developing countries may face in using the system.

However, as Roessler has observed regarding the S&DT provisions in the DSU, these provisions either “state how generally-applicable principles should be implemented in cases involving developing countries” or “set out criteria and procedures applicable exclusively to developing countries” (Roessler 2004: 88). In both cases, most of these provisions are procedural provisions. In other words, although they take into account the generally weaker positions of developing countries and aim at facilitating their access to and use of the system, they do not instruct the judges to interpret the rules in any specific manner. As Qureshi writes, “in the jurisprudence of the WTO there is no coherent and expressly articulated development-friendly approach to interpreting the WTO Agreements. The need for such an approach, in particular which tends to ‘operationalize’ the normally hortatory S&DT provisions, and which displaces the notion that <S&DT] provisions are akin to exceptions, is apparent” (Qureshi 2003: 864).

In a similar vein, Roessler argues that developing countries’ difficulties in reaping the benefits of the DSM “cannot be overcome through the grant of procedural privileges” (Roessler 2004: 90). However, this conclusion is arguably too simplistic, since in many cases the line between procedural and substantial rules is fluid, and in many cases procedural issues have a direct impact on the judiciary’s function and rulings. Thus just looking at the S&DT and blaming their inadequacy on their procedural aspects does not provide a sufficient answer to why they have not been more successful. The reason should be found elsewhere. Namely the way these provisions are set into system as understood by the legal approach.
As stated above, a legal system or a legal provision has two elements – normative and operative – and that a system’s or a provision’s manner of legalization and way of functioning can be explained by looking at three parameters: obligation, precision and coherence. While the level of obligation can be seen in the way the S&DT provisions are formulated, precision and coherence can be assessed by asking the following question: Who is entitled to get what from whom, how, when and why? It should be noticed here that the two elements and the three parameters are interconnected and in most cases cannot be isolated from each other. Having this in mind, I apply this model to analyze some of the S&DT provisions as examples. The first example illustrates that coherence is potentially an important factor in the effectiveness of a provision. The other three examples illustrate how lack or weak degree of obligation, precision and coherence reduces provisions’ effectiveness.

1. DSU Article 3.12: Use of the 1966 Decision as an alternative to the DSU in the consultation phase

Article 3.12 reads as follows:

Notwithstanding paragraph 11, if a complaint based on any of the covered agreements is brought by a developing country against a developed country member, the complaining party shall have the right to invoke, as an alternative to the provisions contained in Articles 4, 5, 6 and 12 of this Understanding, the corresponding provisions of the Decision of 5 April 1966 (BISD 14S/18) <the Decision>, except that where the Panel considers that the time-frame provided for in paragraph 7 of that Decision is insufficient to provide its report and with the agreement of the complaining party, that time-frame may be extended. To the extent that there is a difference between the rules and procedures of Articles 4, 5, 6 and 12 and the corresponding rules and procedures of the Decision, the latter shall prevail.

It is clear that Article 3.12 provides an alternative which a complaining developing country can invoke in cases against a developed country. Thus it is a binding provision. Next I apply the test of “Who is entitled to get what from whom, how, when and why?” The provision clearly defines who can invoke the provision and when (a complaining developing country in cases against a developed country). It should also be clear how the complaining party can invoke the provision: it can simply inform the DSB that the Decision should govern an actual dispute – or a part of it –

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4 No countries have yet invoked this article.
5 It would have been non-binding if it had stated that, “upon acceptance of the defending party”, the complaining party shall have the right to invoke the Decision. And it would have been a gray provision if it had stated that, “in serious situations”, the complaining party shall have the right to invoke the Decision.
and not the DSU. The remaining questions are what the complaining party can be granted and why. In order to answer these questions, we should look at the Decision itself.

First I address why the Decision was adopted and what its aims are. As stated earlier in this Chapter, the Decision was the first attempt to institutionalize the dispute settlement process under the GATT. In eleven paragraphs, it defined some basic structure for the settlement of those disputes in which developing countries were involved, and as such it was the first time that development as a norm that should be taken into account was linked to the dispute settlement process in the GATT. The preamble of the Decision reads:

The CONTRACTING PARTIES,

Recognizing that the prompt settlement of situations in which a contracting party considers that any benefits accruing to it directly or indirectly from the General Agreement are being impaired by measures taken by another contracting party, is essential to the effective functioning of the General Agreement and the maintenance of a proper balance between the rights and obligations of all Contracting Parties;

Recognizing further that the existence of such a situation can cause severe damage to the trade and economic development of the less-developed Contracting Parties; and

Affirming their resolve to facilitate the solution of such situations while taking fully into account the need for safeguarding both the present and potential trade of less-developed Contracting Parties effected by such measures.

The preamble recognizes that developing countries are in a special situation and are more vulnerable. Thus it is important to strengthen the speed of the dispute settlement system, and the “present and potential trade” of developing countries should be safeguarded and be taken into account by the membership in the first place. These are the normative elements of the Decision and thus of Article 3.12. These goals are implemented in the Decision by permitting the complaining developing country to use the Director-General as a sort of facilitator when the defending party is a developed country. It then instructs the disputing parties to cooperate with the DG and permits her or him to consult the relevant organs and – upon a request from one of the disputing parties and two months after receiving the information from the disputing parties – to present a report to the CONTRACTING PARTIES (now the Dispute Settlement Body, DSB).

The CONTRACTING PARTIES are then instructed to establish an expert panel to examine the matter and recommend a solution. The panel has to take into account the development aspect of the
matter and has sixty days to prepare its report. If the developed country is found in breach of its obligation, it has ninety days to report to the CONTRACTING PARTIES on its actions to implement the recommendations. The CONTRACTING PARTIES can examine these actions and, if they have not fully implemented the recommendations, and the situation is serious, then the CONTRACTING PARTIES can permit the developing country to suspend its concessions vis-à-vis the other party. They may also decide any other appropriate course of action.

It should be remembered that in 1966 GATT’s dispute settlement system did not follow any timetable. Since decisions were made through consensus, any country could therefore block the process. Given this background, the Decision introduced a timetable and made the process automatic and in fact shorter than the normal process. The DSU, on the other hand, has established a firm timetable, and defending parties can only block the first request for the establishment of panel. This may explain why no developing countries have yet invoked this article. However, one should also look at the other advantages and disadvantages involved in invoking this article. For example, the consultation period is sixty days, after which it may take approximately thirty days from the first request to establish a panel till it is actually set up at the following meeting (a total of ninety days). According to the Decision the panel is automatically established at the first meeting. However, prior to this, sixty days must have elapsed during which the Director General has offered its good offices. Thus, if a defending party invokes the Decision after the first thirty days of consultation, it has only postponed the establishment of the panel. In return, the DG has been involved as a mediator in the process.

It can be assumed that the Decision will not have any effect on the composition of panels or the panel phase (till the circulation of the Panel Report). Furthermore, the Decision can not replace the appeal process (Article 3.12 states that it can only replace Articles 4, 5, 6 and 12 of the DSU).

The only remaining difference is that, according to the Decision, “in conducting its examination and having before it all the background information, the panel shall take due account of all the circumstances and considerations relating to the application of the measures complained of, and their impact on the trade and economic development of effected Contracting Parties.” No such requirement is included in the DSU. That said, one should ask what this requirement means. One plausible answer is that the Decision permits panels to be freer in interpreting the rules in a dispute, since it has to take into account the economic and developmental impact of “all the circumstances and considerations relating to the application of the measures complained of” in its rulings, and not only the facts of the 

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6 According to Roessler (2003: n.3), “Good offices under the 1966 Decision were invoked in 6 instances and, at least in one (involving India and Japan), led to a mutually agreed solution” (WTO 1995: Volume 2, p. 765).
case and their conformity with the relevant rules (DSU Articles 7, 11).\(^7\) However, in actual cases a panel may also decide not to rule in a different way than it would have done if it had not had to consider the economic and development impacts of the disputed measure. Furthermore, one could argue that the disputed measures have an impact on the economy and development of both parties and these different impacts may neutralize each other. However, regardless of panels’ rulings, any party may appeal against their findings in this regard. In this case, the Appellate Body has the final word on what the Decision actually asks panels to do. If my understanding of the Decision is right, then Article 3.12 of the DSU provides developing countries with a substantial advantage which they have not yet made use of. This advantage is the result of a binding provision, which is relatively precise and has been made part of a system, on both the normative (in the preamble) and operative levels (in the DSU and the Decision).\(^8\)

2. Article 4.10: During consultations the interests of developing countries should be recognized

Article 4.10 reads, “During consultations Members should give special attention to the particular problems and interests of developing country Members”. This provision is a good example of a grey or even non-binding, imprecise and unstructured provision.\(^9\) It should be assumed that the reason for this provision is to encourage members to safeguard the interests of developing countries. However, this is not formulated in a binding manner, simply because it says “should”, not “shall”. As such it remains a normative statement which is not mandatory or operationalized. Next, I can apply the test of “Who is entitled to get what from whom, how, when and why?” From the provision it is clear that this provision can only be used “during consultation”. Once this is clear, the provision only raises a great deal of questions without giving any answers. To start with, I look at the “who” question. According to the provision, developing countries can expect action from other countries. The question here is which developing countries. The answer may, for example, be all developing countries, or those disputing countries that are a party to a dispute. However, it is more likely that the former understanding is meant by the provision, since it is “Members” that are expected to perform an act. And since “Member” is \textit{de facto} a generic term, then the phrase: “developing country Members” should also be understood as a generic term. The next question is what actions should be expected from members. Here the only clue

\(^7\) DSU art. 21.8 also states that the DSB “shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country members concerned”. However as I will argue below this provision only relate to the implementation period of a ruling, e.g. in calculating the reasonable period of time.

\(^8\) The decision was also included in the 1979 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance (L/4907).

\(^9\) This provision has not been invoked yet.
is “special attention”, which does not say much. Furthermore, neither “special attention” nor “particular problems and interests” are defined elsewhere in the DSU.

3. Article 12.11: Panels' analyses of the invoked S&DT provisions

Article 12.11 reads, “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 form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures”. This provision is also meant to ensure due process and safeguard the interests of developing countries.  

Generally speaking it is a binding provision, which instructs panels to indicate how it has taken the relevant S&DT provisions into account in the process. The problem here is that this task is already there. The provision states that panels shall do this, when and if a relevant S&DT provision is raised by the developing country, this being a general requirement under Article 11. The only time this provision may have an impact is when panels decide to exercise judicial economy and not address all the matters in dispute.

Although the provision seems precise, in fact it is far from being so. Two things in particular make it imprecise. First, it does not say that panels should address S&DT provisions that have been raised, but they should address any that are relevant to the case. The question here is what constitutes a relevant provision, and who decides its relevance. Secondly, it instructs panels to indicate explicitly the form in which they have taken into account the raised provision, without stating what this means. As a result, in most cases, panel reports include a paragraph basically stating that the raised S&DT provisions have been taken into account. This problem represents a lack of coherence regarding this provision, since the task could have been defined further or otherwise made into a system.

In these examples the problem was that the S&DT provisions were non-binding, imprecise and did not clearly answer the “who is entitled to get what from whom, when and why” test. Seen from a bird’s-eye perspective, the problem of not constituting a system is also evident in the other WTO agreements. Faced with this situation, and arguably in order to put themselves on safer ground, the judiciary has opted for a formal, literal and conservative method of interpretation in almost all their rulings, with some noteworthy exceptions mainly regarding procedural issues, such as amicus letters.

10 See next chapter for those cases in which this article has been invoked.
11 Judicial economy is defined as “Efficiency in the operation of the courts and the judicial system; esp., the efficient management of litigation so as to minimize duplication of effort and to avoid wasting the judiciary's time and resources” (Garner 2001). In practice this means that the judges find that they do not have to decide some aspect of a case to be able to rule, or that their rulings in some parts of a case make it unnecessary to rule on all the issues raised.
The literal and contextual methods are the traditional and 'safe' methods of interpretation. Under them, a judge must interpret a rule according to its ordinary meaning within the context in which it has been used, for example, in other provisions within the same treaty (Holland and Webb 2003). The problem with these methods is that they do not take into consideration the possible outcomes of the ruling. Furthermore, a literal reading of a rule would in many cases make it too static and limit its applicability and flexibility.

Another method of interpretation is so-called 'Object-Purpose', which examines the reasons behind the rule and interprets it accordingly. However, this method is disputable, since it is not always clear what the reason (the normative element) behind a rule is, and there may be several and at times conflicting reasons for a provision. In such situations, the judicial body has a mandate to choose between the concurring norms, and it does so typically by looking at the background of the rule, including its ordinary meaning. An important difference between these methods is that the literal and contextual methods are not interested in the consequences of a ruling, while the last method is (ibid.).

Two reasons can be identified for panels’ frequent recourse to literal readings of the provisions. First, the literal method provides a more solid ground for panels’ findings than other methods. Secondly, panels are typically part of countries’ WTO delegations. Although they do not hear disputes related to their own country, they are well aware that their findings might be used against themselves. This may prevent them from applying a more creative method of interpretation and from reaching more controversial conclusions.

4. Strengthening Development in the WTO

After establishing the theoretical tools and using them to identify the deficiencies of the legal status of development in the WTO, this part uses the tools to present some ways situation can be improved. The current round of WTO negotiations has provided countries with the opportunity to perform this task. In general, and in line with my theory, this can be done along three modes, horizontal, vertical and projection.

Strengthening the normative elements

As stated above the normative elements of a regime define the regimes’ reason d’être. Accordingly, the WTO negotiations can establish a firmer basis for the legal status of development in the WTO. In other words, although it is assumed and has been suggested – and recognized - that S&DT provisions

12 Art. 31-33 of the Vienna Convention on Law of Treaties list these interpretation methods.
are meant to addresses developing countries’ special needs, it is not clearly and firmly supported in the WTO. In fact, in many cases the reason behind a S&DT provision is not clear at all. This is especially the case regarding the S&DT provisions in the DSU. This can be done by linking all existing S&DT provisions together. As such the situation resembles GATT’s codes. As in that case, the problem with the S&DT provisions can also be solved by linking them together and placing them under one umbrella. This way, they may come to represent a stronger body of rules governing development and defining developing countries’ rights and obligations.

Efforts along this line can be called horizontal. Through horizontal mode the judicial bodies will have some reference points by which they can justify a freer interpretation of the existing S&DT rules and of course other WTO rules when they are applied in relation to developing countries and development in general. This task can be done through an update of Part IV of the GATT, which regardless of its non-binding nature in fact was successfully raised in two GATT cases, and/or inclusion of specific statements explaining why a provision is in place, for example regarding S&DT provisions in the Agreement on Anti-Dumping.

**Strengthening the operative elements**

Secondly, development can be strengthened through binding, more precise and detailed procedural rules. Here the aim is to strengthen the operational aspects of an issue. This can be called vertical mode. Some developing countries have applied this strategy and have tabled proposals aimed at strengthening the operational aspects of S&DT provisions. For example, a group of countries has proposed an amendment to DSU Article 4.10. According to their proposal, the article should explicitly state what “special attention” means. Here it is suggested that, in cases against developing countries, developed countries “shall” explain how they have paid special attention to the disputing developing countries’ problems and interests. Furthermore, the proposal asks panels to rule on this issue. As such this mode aims at making the existing articles more precise and establishing a system by which their functions can be assessed.

**Linking WTO to International Law**

A third way development can be strengthened in the WTO is to project the matter into the realm of international law. Accordingly, almost all legal system, domestic as well as international, with the notable exception of human rights, operate with different sets of rules which aim at addressing difference between different and unequal actors and hereby provide a level playing field for them. This

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14 TN/DS/W/19, proposed by Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe
can be understood as being part of the main sources of international law: customary international law and a general principle of law. This is of course also the case with the WTO’s existing S&DT provisions. In fact in para. 162 of its report in *EC – Tariff preferences*, the Appellate Body recognizes this for of differentiation and states that “Responding to the "needs of developing countries" may thus entail treating different developing-country beneficiaries differently”. Nevertheless, till now, these provisions have been seen in the limited world of WTO law and not as a form of international law obligations of states, which in the WTO is formed as S&DT provisions. A result of this view has been that the WTO panels and Appellate Body have not given effect to non-binding provisions, merely because they are formulated as non-binding provisions. However, it can be argued that the panels and the Appellate Body have to address such provisions as a general principle of law or customary international law, simply because they are included in the WTO.

A review of the negotiations shows that the negotiators have mainly focused on the first two parameters (Alavi 2007). However, they have been too divided to reach any compromise. On this background, the third parameter may offer a solution to the problem. Not least because, DSU art. 3.2 has already placed WTO law as part of international law and various DSB rulings have recognized this linkage.

To this end the WTO states’ acknowledgement of this linkage can be supplemented by the rulings of the WTO’s judicial bodies and the writings of researchers. This article makes a small step in this direction. Finally it should stated that if such linkage is formalized, it may also mean that the WTO organs should put a stronger emphasis on other normative issues, such as human rights, cultural diversity, environment and transparency in the WTO.


