COLUMN:
STATUS OF DEVELOPING COUNTRIES - ISSUES SURROUNDING SPECIAL AND DIFFERENTIAL (S&D) TREATMENT

As of February 2020, the WTO has 164 member countries, approximately three-fourths of which are developing countries. Although the United Nations has a definition for the "least developed countries" ("LDC")[9] that applies mutatis mutandis, there is no definition of "developing countries" in the WTO Agreements. On the basis of self-declaration, developing countries enjoy special and differential treatment ("S&D"), including preferential market access and longer time periods for implementing certain obligations. There are 155 S&D provisions in various WTO Agreements[10].

The United States has long argued that economically-advanced developing countries should assume the appropriate level of obligations and stop using S&D "unreasonably". In February 2019, the United States submitted a proposal for a decision of the WTO General Council regarding uniform thresholds for graduation from developing country status[11]. Developing countries strongly opposed this proposal. This column summarizes the framework and role of S&D and elaborates on the status of discussions in the WTO.

1. OVERVIEW AND ROLE OF S&D

S&D provisions were also included in the GATT before the WTO was established. The ideology behind S&D was one of the elements included in The International Trade Organization (ITO) Charter, which aimed to facilitate a balanced growth of the world economy based on full employment and free trade, but it ended up not entering into force because it was too idealistic to be ratified even for the United States, which was the proposing country, and other countries. One element of the ITO Charter that later remained in the GATT was an exception for infant industry protection in Article XVIII of the GATT. Subsequently in 1965, the GATT Part IV "Trade and Development" was added, which confirmed that developed countries would not seek reciprocity in trade negotiations with developing countries. However, this is only a basic agreement and does not refer to the creation of preferential treatment that was requested by developing countries. The first preferential treatment granted in the GATT regime was the Generalized System of Preference, an exception to the Most-Favored-Nation principle ("MFN principle"), which was provisionally agreed in 1971 and implemented in 1979 in the form of an "Enabling Clause".

S&D is positioned as an exception to the basic principles of the GATT. The basic principles of the GATT can be broadly divided into two categories: the principle of non-discrimination, which is comprised of the MFN principle and the national treatment principle; and the reciprocity principle, which aims at maintaining a balance of treatments, including rights, obligations, burdens and benefits, between two countries. S&D is a departure from the MFN principle, mainly in that it provides preferential market access to developing countries, and permits a departure from the reciprocity principle in that it reduces or eases the implementation of certain obligations.

The WTO classifies the contents of S&D into the following six types: (1) provisions aimed at increasing trade opportunities for developing countries; (2) provisions aimed at requesting WTO Members to protect the interests of developing countries; (3) provisions aimed at allowing flexibility in the economic policies or commercial policy measures used by developing countries; (4) provisions

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[9] Article XI, Paragraph 2 of the Agreement Establishing the World Trade Organization. According to the United Nations, there are 47 nations listed as LDC as of December 2018. (https://www.un.org/development/desa/dpad/least- developed-country-category.html)

[10] WT/COMTD/W/239

[11] WT/GC/W/764

aimed at allowing longer transitional time periods for implementing agreements; (5) provisions aimed at providing assistance to developing countries for developing the human and physical infrastructure necessary for performing their obligations under the WTO Agreements and for performing dispute resolution proceedings; and (6) provisions relating to LDCs. Examples of each type include: (1) preferential market access; (2) an obligation to give regard to the special situation of developing countries under Article 15 of the AD Agreement and exempting developing countries from the de minimis rule under Article 9 of the SG Agreement; (3) tariff measures to protect domestic industries and quantitative restrictions aiming at raising the general standard of living of people under Article XVIII of the GATT[12]; (4) allowing longer transitional time periods for the elimination of preferential subsidies for domestic products under Article 27.3 of SCM Agreement (the periods are three years for developed countries, five years for developing countries and eight years for LDCs after the WTO Agreement came into force or after accession to the WTO); (5) technical assistance and capacity building for implementing agreements; and (6) the obligation of developed countries to provide incentives for technology transfers to LDCs under Article 66.2 of the TRIPS Agreement.

The role and function of S&D in developing countries varies with the development and transition of the multilateral trading system. Since the GATT was adopted in the form of agreements called "codes" on a self-selection basis for non-tariff measures other than tariff concessions, which allowed WTO members to select the range of agreements to be accept and implement, many of the developing countries did not participate in the codes and did not have treaty obligations regarding their domestic measures. Subsequently, in the Uruguay Round, in addition to further reduction of tariffs, a significant expansion of the areas of negotiation was achieved, including rules on liberalizing trade in services, intellectual property rights, trade-related investment measures and agricultural subsidies. Furthermore, in the Uruguay Round, an acceptance method called "single undertaking" was adopted, whereby all negotiation items were treated as one package for final agreements even though negotiations were conducted individually for each area. Consequently, the members were forced to choose whether to agree with the package or nothing at all. In order to participate in the WTO, which was agreed to be established in the Uruguay Round, developing countries had no choice but to accept the commitments in the expanded negotiation areas and had to assume various treaty obligations. Since the WTO was established, developing countries have expressed their strong dissatisfaction with the fact that they did not actually enjoy the benefits they expected to have as a result of the reduction of tariffs in developed country markets, but instead have been given the heavy burden of implementing obligations agreed at the Uruguay Round in a wide-ranging and detailed manner. This dissatisfaction led to calls for strengthening S&D in the Doha Development Agenda.

Consequently, even though the role of S&D sought by developing countries was to expand access to developed country markets prior to the Uruguay Round, the main role of S&D shifted to the reduction or exemption of treaty obligations after the establishment of the WTO.

2. DISCUSSIONS IN WTO

In February 2019, the United States submitted a proposal for a General Council decision regarding uniform graduation thresholds. Behind this was President Trump's strong concern that "certain self-declared developing countries which achieved growth keep enjoying S&D and fail to perform their responsibilities that is consistent with their level of economic development"[13]. The graduation thresholds

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[12] Kodama, "Discussion on the possibility of invoking GATT Article XVIII C – Using a topic of S&D negotiation in Doha Development Agenda", Annual Report of Japan Association of International Economic Law No. 17 (2008)

[13] The United States has raised the issue of the treatment of economically and technically advanced developing countries and the discussions on the developing country status is different from the issue of non-market economy status, which is based on whether or not market mechanisms are functioning (specifically, whether the government controls the foreign exchange market and production

proposed by the United States consisted of four elements: (i) OECD members; (ii) G20 members; (iii) countries classified as "high-income" by the World Bank; and (iv) countries accounting for at least 0.5 percent of global merchandise trade. The developing countries that meet each of the thresholds are: (i) Chile, Israel, Turkey, Mexico and South Korea; (ii) China, India, Brazil, Mexico, South Africa, South Korea, Indonesia, Saudi Arabia, Turkey and Argentina; (iii) Argentina, Bahrain, Brunei, Chile, Hong Kong, Macau, Israel, Kuwait, Monaco, Oman, Philippines, Qatar, Singapore, Ukraine, Uruguay etc.; and (iv) UAE, Hong Kong, Malaysia, Philippines, Saudi Arabia, Singapore, Thailand, Turkey, Vietnam, South Africa etc. In December 2019, the thresholds of (iii) and (iv) were relaxed to be limited to countries that meet the thresholds for three consecutive years.

In response to the proposal by the United States, developing countries argued that S&D was a fundamental and legitimate right given to developing member countries. The proposal submitted by Norway (jointly with other seven countries including Canada, Mexico and Switzerland) in April 2019[14] described the history of the S&D provision and introduced the method of providing S&D under the existing agreements and justifiable reasons. The proposal referred to the Trade Facilitation Agreement that provides S&D based on each developing country's own needs assessment and the approach of GATS, in which each developing country commences with the minimum level of commitments and increases its commitments depending on its industrial capacity or development level, and proposed that both the Trade Facilitation Agreement and the GATS approach could be used as a reference, and argued that they should explore how S&D should be pursued in each negotiation.

While the United States proposed the graduation thresholds from the perspective that developing countries should assume a certain level of commitment and responsibility that are consistent with their level of economic development, it did not deny that S&D was necessary for "real" developing countries and that they are entitled to enjoy their status. It is still necessary to discuss which countries are the "real" developing countries entitled to enjoy S&D status, but even the developing countries that do not fall under any of the four thresholds mentioned above are also increasingly opposed to the United States.

The memorandum of President Trump issued in July 2019[15] called on the USTR to take some actions. Specifically, that after the deadline specified in the memorandum (i.e., 90 days from the date of the memorandum), the USTR would no longer treat a country as a developing country on a unilateral basis if the country met any of the four graduation thresholds proposed by the United States in February 2019. As part of the implementation of the actions requested by the President, the USTR indicated in December 2019 that it would not agree to any new S&D with certain developing countries in ongoing WTO negotiations unless such countries forgo their S&D.

President Trump singled out the S&D issue as one of the top priority issues of WTO reform. Close attention should be paid to future developments of the United States' action in rule negotiations in the WTO and FTA negotiations.

As of February 2020, four countries which declared that they will no longer call for S&D in current and future negotiations include Taiwan (at TPR in September 2018, stated that it would forgo S&D in future round, prior to the proposal by the United States), Brazil (in March 2019, after the proposal of the United States, in exchange for support for becoming a member of OECD), Singapore (in September 2019, after direct encouragement by the United States) and South Korea (in October 2019, after direct encouragement by the United States).

It should be noted with an attention that the outcome that the United States seeks from developing

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activities).

[14] WT/GC/W/770 and WT/GC/W/770/Rev.2

[15] https://www.federalregister.gov/documents/2019/07/31/2019-16497/reforming-developing-country-status-in-the-world-trade-organization

countries is not for them to abandon their developing country status, but rather confirmation that they will not seek S&D in the future. The developing country status has strong political and social implications in developing countries and may sometimes be difficult to abandon such status. The above-mentioned four countries also reiterated their commitment not to seek S&D in current and future negotiations, rather than abandoning their developing country statuses.

In addition, attention should be paid to the similarities and differences between S&D, that can be enjoyed on the basis of having a developing country status, and the flexibilities of treaty obligations that the members can obtain through negotiations. The United States does not deny the right of member countries to obtain flexibilities of treaty obligations through negotiations either, and many developed countries, including the United States, have actually secured the members' agreements for partial exemption or relaxation of treaty obligations during the Uruguay Round in relation to sensitive areas such as agriculture. The United States takes the position that there are some cases where such flexibilities are necessary, and it is acceptable to enjoy the flexibilities to the extent necessary based on agreements among the members. In other words, while both S&D and the flexibilities obtained through negotiations are formally the same in terms of deviations from treaty obligations, the United States considers it problematic that the deviations are allowed "unilaterally without agreement of the members and in a uniform manner without distinction in the level of economic development"[16]. The United States also insists on the need to differentiate developing countries while at the same time proposing uniform graduation thresholds.

Now that 25 years have passed since establishment of the WTO and players in the multilateral trading system have greatly changed and diversified, how should S&D be provided? It would not be justified to treat all developing countries with significantly different levels of economic and technological development equally and to allow all of them to deviate from their obligations. On the other hand, the uniform thresholds proposed by the United States will not only cause great backlash among developing countries, but also will not lead to the provision of S&D that meets the real needs of the developing countries. Japan's position is that S&D should be provided to countries that truly need it, to the extent necessary, and any country that has capabilities and means should fulfill its obligations appropriately. To achieve this, it is necessary to differentiate among developing countries and it would be helpful to determine the scope of "developing countries" for each negotiation by reference to the method of providing S&D under the existing agreements as proposed by Norway and other countries, as well as to determine the scope of S&D to be enjoyed by each country. Meanwhile, a potential concern is that having negotiations for each country and by each area is time consuming and the results of the negotiations will vary depending on the power balance of the countries involved in the negotiations, and what the developing country wishes to and actually can obtain in exchange for abandoning S&D. As an initial instance, the results and process of ongoing negotiations on fisheries subsidies and rulemaking in e-commerce could draw a certain direction on how this will be realized.

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[16] Strictly speaking, in the case of a subsidy agreement, for example, a category of developing countries with low economic development level has been established to allow broader flexibilities.