

This paper is one in a series of briefing papers by the International Institute for Sustainable Development. Each of the papers focuses on an issue of particular importance for sustainable development in the South in the WTO's current round of negotiations—the so-called Doha Development Agenda. The aim of the series is to set out, in brief and uncomplicated style, what is at stake in those negotiations for those concerned with international development and the environment. The full set of papers, and more information about IISD's work on trade and sustainable development, can be accessed on IISD's Web site at <http://www.iisd.org/trade>.

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Special and Differential Treatment

The term “special and differential treatment” (SDT) has a narrow meaning in the WTO. It describes preferential provisions that apply only to two groups of members: developing countries (DCs) and the least developed (LDCs).¹

Historically, the cases for and against SDT have been couched in developmental terms, a key argument being whether lower levels of development justify special treatment or, by contrast, make the adoption of “standard” rules even more desirable. The standard development arguments for SDT are twofold.

First, it is argued, it is developmentally undesirable for some countries to follow policies that are sensible for others. The Agreement on Agriculture, for example, has as a core objective the removal of the substantial OECD distortions that have led to higher agricultural output than can be justified economically. For many poor developing countries, though, the agricultural problem is quite the reverse: through neglect and bias, their production is far below what it should be. Instruments designed to curb excessive subsidy to agriculture in rich countries might easily get in the way of much needed increased support to agriculture in poor ones.

The other argument is that parts of the new trade agenda are developmentally desirable, but the opportunity cost of implementation *at this stage* is too high. This is because it is expensive in terms of finance, human resources, or governmental/judicial attention. At the same time, the cost to the world trade system of non-implementation is trivial (because the country's share of relevant trade is miniscule). For example, Malawi would benefit from introducing the WTO customs valuation code—but not by as much as from alternative uses for the resources required. And there would be few external repercussions from non-implementation.

A more recent, pragmatic case argues that SDT is not only desirable but actually essential if the WTO's Doha Round of negotiations is to move beyond a very low lowest common denominator. This argument is explored in greater detail below.

The status quo

The history of SDT has been well covered (for example by Michalopoulos 2001, Whalley 1999 and Fukasaku 2000). In essence, it is that:

- SDT had its origins in a view of trade and development that questioned the desirability of DCs liberalizing border measures at the same pace as industrialized countries (ICs);
- the popularity of this approach was in decline (possibly temporarily) in many DC governments during the negotiation period for the Uruguay Round Agreement;
- consequently, many SDT provisions on border measures and subsidies envisage DCs (although not necessarily LDCs) following a similar path to that of the ICs, albeit at a slower pace; and
- other SDT provisions (particularly those covering positive support to DCs and LDCs via financial and technical assistance or technology transfer) were agreed in a form that is not enforceable within the WTO system.

There are three forms of SDT in the WTO Agreements: modulation of commitments, trade preferences and declarations of support.

Modulation of commitments

The most substantial SDT provisions are those that allow for a modulation of commitments by different type of member. Hence, for example, the Agreement on Agriculture requires the ICs to reduce their tariffs by 36 per cent over six years, but DCs have to do so by only 24 per cent over 10 years. LDCs do not need to cut their tariffs at all. Similarly, the Agreement on TRIPs required ICs to implement its provisions within one year (from January 1, 1995), but for DCs this transition period was five years (extendable to 10 years for technology sectors where no previous intellectual property [IP] protection was accorded). For LDCs the delay was 11 years (extendable on request to the WTO Council).

This form of SDT is legally enforceable in the following sense: a WTO member may use the dispensations granted under SDT in its defence if its trade policies are challenged by another WTO member on the grounds that they do not conform with the Uruguay Round commitments. Hence, for example, if India were challenged on the grounds that it had not reduced its agricultural tariffs by 36 per cent, it would have a watertight defence in dispute settlement by pointing to the fact that it is required to liberalize by only 24 per cent.

Trade preferences

The second area is the provision of trade preferences (mainly by ICs to DCs and LDCs). Under the 1979 GATT Enabling Clause, WTO members are permitted to grant tariff preferences to DCs and LDCs without having to grant the same treatment to ICs. The Enabling Clause basically shelters these sorts of preferences from the GATT's most-favoured-nation (MFN) obligations.

The legal enforceability of these provisions is questionable. A strong case can be made that the Generalized System of Preferences (GSP) of most ICs can be justified under the Enabling Clause. In other words, if the European Union (EU) were to be challenged in dispute settlement by an IC on the grounds that the standard GSP tariff available to all DCs was lower than the MFN tariff being applied to imports from the plaintiff, the EU would probably be able to cite the SDT provisions of the Enabling Clause in its defence.

However, as has been seen in the case of the challenges from Latin America and the USA to the EU banana regime, other aspects of trade preferences are less securely underpinned by legally-enforceable SDT. Problems arose in the case of bananas because:

- the differential tariff was challenged on the grounds that it favoured one group of DCs over another (and, hence, could not be justified under the Enabling Clause); and
- the system of import licensing for companies was challenged on the grounds that it contravened the EU's commitments under the General Agreement on Trade in Services (GATS).

A current potential dispute between Thailand and the EU under Article XXIII might result in further case law in this area. Thailand argues that the EU's new GSP (notably the provisions on graduation) "nullifies or impairs" the benefits it obtains from the WTO. India has also initiated a dispute against the EU's multiple tiers in the GSP that grant to some (in this case the Andean/Central American states) more favourable treatment than others (including India).

Declarations of support

The third area of SDT is wholly unenforceable. It comprises the large number of declarations of support for DCs and LDCs that litter the Uruguay Round texts. For example, Article 4 of GATS deals with encouraging the increased participation of DCs in international services trade through "negotiated specific commitments" relating to the strengthening of their domestic services capacity, improvement of their access to distribution channels and liberalization of market access in sectors and modes of supply of export interest to

them. Similarly, the *Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries* requires members to review their levels of food aid to ensure that they are sufficient to meet the legitimate needs of DCs, to adopt guidelines to ensure that an increasing proportion is provided to LDCs and net food-importing developing countries (NFIDCs) and to give full consideration in their aid programs to help improve agricultural productivity and infrastructure.

There is no action that an aggrieved DC can take, either inside or outside the WTO, to force another member (or an international organization) to act on these undertakings. A considerable element of the discontent expressed by DCs in the WTO over the failures of SDT derives from resentment that they were misled into signing the Single Undertaking in the belief that these sorts of commitments would be more concrete than they have turned out to be. By contrast, the obligations they accepted in return were all couched in "hard" law.

Problems

If one accepts the arguments for the provision of SDT, there are two principal problems with the *status quo*. One is that the existing, legally-enforceable SDT provisions amount to eroding assets, the value of which is declining either directly or indirectly. The implementation delays under TRIPs and the Agreement on Agriculture, for example, will cease to provide differential treatment once the extended timetable has expired. Similarly, SDT provisions that require DCs to liberalize/reduce subsidies (but slowly) will cease in due course to have any force when the DCs' remaining barriers reach very low levels. While LDC concessions will not suffer erosion where they involve total exemption, many vulnerable countries do not fall within this group. Moreover, the transition economies are often excluded from SDT provisions. Like other recent WTO entrants, they have typically been required to accept during their accession negotiations commitments that go well beyond the Uruguay Round texts.

The other problem is that large areas of "new" trade policy are without any legally enforceable SDT. In the same vein, many developing countries see a problem with the lack of "hard law" SDT provisions in the Uruguay Round results.

The case for new SDT

The Doha Declaration includes specific provisions for negotiations on SDT. Para 44 states that all SDT provisions should be reviewed with a view to making them stronger, more precise, more effective, and more operational. The discussions are currently being conducted largely in the Committee on Trade and Development. They should have reached a conclusion by mid-2002 but this deadline has had to be extended, and

progress has been very slow. A flavour of the issues is provided in WTO 2002 (a) and (b).

There is disagreement over which should come first: decisions on cross-cutting issues or on provisions within specific agreements. The former include the principles and objectives of SDT, whether there should be one, two or multiple tiers of provisions, technical assistance and capacity building, transition periods, and graduation. Some developing countries have feared that a premature decision on cross-cutting issues might limit the scope for subsequent agreement-specific SDT. The WTO Secretariat's July 2002 summary of positions lists no fewer than 86 separate submissions on existing agreements and decisions. Yet, as the summary indicates, these were subject to nothing "more than a preliminary consideration..." (WTO 2002b, para. 11).

There are two strong arguments for breaking the current stalemate. The first is a pragmatic case for SDT: without strong SDT provisions it will be difficult to conclude the Doha Round. For there to be closure there must be consensus, including consensus on the mandated negotiations on SDT. Because of the surge in use of dispute settlement, it is unlikely that by the end of the Doha Round countries will be willing to put their trust in vague phrases that might subsequently be defined judicially in unexpected ways. This leaves only four obvious alternatives for achieving closure:

- weaken the current provision of binding dispute settlement;
- re-introduce the multiplicity of plurilateral agreements that characterized GATT;²
- extend the GATS "positive-list" approach, making certain obligations applicable only in sectors/contexts where countries so specified; or
- create new, more robust forms of SDT.

Arguably the last is the most attractive. If so, the success of the Doha Round rests on the ability of the negotiators to build a stronger regime of SDT.

The second argument is the development case for SDT that was made earlier in this paper. It is developmentally-undesirable for some countries to follow policies that may be sensible for others. And even where all countries would benefit from certain policies, it may be unreasonable to demand that DCs and LDCs adopt them, if it would mean diverting resources from other more pressing development needs, and if the costs to the world trading system of not adopting them would be minimal.

The shape of the new SDT

There is, however, considerable uncertainty—particularly in the new areas of trade policy such as TRIPs—about what form effec-

tive SDT would take. For example, while TRIPs adopted extended implementation periods for DCs and LDCs, these were not based upon any assessment of their capacity for implementation. The extended periods were purely negotiated dates to which all parties could agree actively or passively. If future agreements are to do better, what forms of objective criteria exist to determine either the appropriate degree or duration of SDT? The SDT provision for the LDCs, for example, allows for an extension on request, but the agreement provides no objective basis on which to judge whether or not such a request is justifiable.

The most fundamental development criterion for SDT is that, in the area being negotiated, a "one size fits all" approach would not necessarily be appropriate. Almost all WTO members adopt this principle to a greater or lesser extent in their domestic economic policy. Many countries have differential economic policies to favour peripheral regions or disadvantaged social groups. This is in recognition of the political, if not the economic, necessity to treat some areas/groups differently from others. Such considerations apply *a fortiori* at the global level.

If it is accepted that the default assumption at the multilateral level should be that one size *does not* fit all, three further criteria are required to support a case for SDT. They are:

1. the interests of each member must not be so different that they require unique treatment (which must be dealt with in their national schedules of commitments);
2. there must be some way to identify broad groups of countries that share sufficiently similar characteristics to warrant the uniformity of treatment among themselves but differential treatment compared with others; and
3. there must be some actionable mechanisms that relate to these shared differences and to the rules that are being proposed.

The problem with operationalizing either form of developmental SDT is that neither the relevant categories nor the appropriate criteria are well understood. The DC group, for example, includes Argentina and other Cairns Group members, whose agricultural needs are quite different from those of, say, Mauritius or Kenya. Much work needs to be done to identify appropriate groups, the forms of SDT that they need, and the criteria for their eventual graduation.

But the problems are not just technical: it is likely to be politically very difficult to "sell" the idea of differentiation to an organization that acts by consensus. That is, categories are all very well until a country discovers that it is excluded. There will be pressure to loosen the parameters of any proposed group until it becomes so vague that other countries (including, but not necessarily exclusively, the industrialized countries) are no longer willing to agree to significant SDT for such a varied group.

All proposals for effective SDT face the hurdle that some Members will be unhappy agreeing to flexibilities that would apply equally to all developing countries, but differentiation will be very difficult to negotiate. One advantage to a complex set of differentiations is that it increases the chances of most countries obtaining something.

An analogy can be made with the complex, concurrent negotiations in GATT/WTO Rounds which are justified on the grounds that they increase the likelihood of each Member having “gains” (e.g., in the form of better access to other markets) to offset the “losses” (e.g., of “conceding” improved access to its market). Similarly, a system of effective SDT in the Agreement on Agriculture for a food-insecure sub-group, *and* in TRIPs for a “pharmaceutical vulnerable” sub-group, *and* in services for “culturally important” items, etc., increases the chances that many developing countries will perceive sufficient advantage from the SDT to which they are entitled that they are willing to acquiesce in the exclusion from some other areas of SDT.

Conclusions

At the time the Uruguay Round was completed it seemed that the days of SDT were numbered. The popularity of the theories that had underpinned it in the GATT was in decline. Many commentators saw the provisions in the WTO Agreement as a transitional phase leading to the eventual disappearance of special treatment for particular types of members.

The picture today is very different. Arguments about the meaning of the SDT provisions in the WTO texts are souring the negotiating environment for the Doha Round. The experience of many DCs with what they perceive to be inadequacies in the WTO has led to a strong renewal of interest in robust differentiation.

In many respects this is a reflection of the WTO's success. It is a much more universal organization than was the GATT. Its decisions are binding—unlike those of the GATT. And it is extending the agenda of rule-making into many “beyond the border” areas that were hitherto sovereign territory for Member States.

All of these factors make differentiation more important than it was before. The major problem is that the system inherited from the GATT is too unrefined to distinguish between, for example, Ghana and Argentina—both of them “developing countries,” but with very different agriculture. The identification of the special characteristics of sub-groups of WTO members that would merit differentiated treatment and the type of commitment modulation that is justified has not yet caught up, and the political challenges to finding a consensus on such an approach are significant. A great deal of work will need to be undertaken if the Doha Round is to have available to it realistic and usable forms of SDT by the time the final decisions need to be taken.

Endnotes

- 1 In a broader sense, differentiation applied much more widely under the old General Agreement on Tariffs and Trade (GATT), where the combination of vague phraseology on contentious issues and non-binding dispute settlement allowed contracting parties to define some obligations as they saw fit. A goal of the Uruguay Round agreement was to curb this flexibility, which was seen to be constraining trade. Much of the renewed interest in SDT arises from a view that the formal provisions for differentiation have not evolved to deal adequately with the new less flexible environment.
- 2 Plurilateral agreements need not be signed by the entire membership. While these were plentiful under the GATT, the Uruguay Round results made most of them multilateral (all members were obliged to accede).

References

- Fukasaku, K., 2000, “Special and Differential Treatment for Developing Countries: Does It Help Those Who Help Themselves?” *Working Paper* 197, Helsinki: UNU World Institute for Development Economics Research.
- Michalopoulos, C., 2001, *Developing Countries in the WTO*, New York and Basingstoke: Palgrave Macmillan.
- Whalley, J., 1999, “Special and Differential Treatment in the Millennium Round,” *Working Paper* 30/99, Coventry: University of Warwick, Centre for the Study of Globalisation and Regionalisation.
- WTO, 2002a, “Special and Differential Treatment Provisions: Joint Communication from the African Group in the WTO,” TN/CTD/W/3/Rev.2, 17 July, Geneva: World Trade Organization.
- WTO, 2002b, “Draft Report to the General Council: Revision,” TN/CTD/W/12/Rev.1, 22 July, Geneva: World Trade Organization.

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