

# Special and Differential Treatment

## Stalemate in the "Development" Round

*Special and Differential Treatment (S&DT) is the collective term used for those provisions across World Trade Organisation (WTO) Agreements, which make for differentiated rights and obligations for developing countries on account of their lower levels of development. The conceptual basis for S&DT is derived from the widely accepted rationale that there is a wide gap in the economic capacities and levels of development of the developed and developing countries, and the developing countries cannot compete on equal terms with developed countries.*

*The concept of S&DT has a long pedigree. It was embedded in the principle of 'non-reciprocity', a concept that was formalised in the Kennedy Round of Trade negotiations of the GATT in 1964. Introduced as Part IV of GATT, non-reciprocity became one of the core pillars of S&DT in this period. The concept of S&DT was reaffirmed at the Tokyo Round of Trade Negotiations of the GATT in 1979 under a framework commonly known as the 'Enabling Clause'. The notions of 'non-reciprocity', as conceived of originally, however began to lose its importance in the 1980s in tandem with changing international economic relations. S&DT of a new nature evolved, primarily aimed at assisting developing countries in implementing WTO obligations. Today, although the need for differentiation for developing countries in international trade is not disputed, the form and content of S&DT has become a matter of intense debate.*

*S&DT for developing countries is not a stand-alone agreement, but the provisions run across the various WTO Agreements. There are at present, 145 such provisions, which form the core of the 'development' dimension of the multilateral trading system (ICTSD & IISD, February 2003).*

### Doha to Cancun

The very Preamble to the WTO gave due recognition to the concept of S & DT. The Agreement establishing the WTO explicitly states, "There is a need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development". However the market access situation of developing countries did not improve significantly since the Uruguay Round. In fact, it is argued that in practice the outcomes of both the Uruguay and Doha Round of Trade Negotiations has been in favour of developed countries, creating several imbalances in the WTO system.

In the work programme of the Doha Ministerial Declaration, Ministers reaffirmed that "provisions for special and differential treatment are an integral part of the WTO Agreements". Further, as per Para 44 of the Doha Ministerial Declaration, "special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational". The Ministers agreed that the Committee on Trade and Development would be the body responsible for the same. 31 July 2002 was the deadline for the CTD to report to the General Council with "clear recommendations for a decision" on the review of S&DT provisions.

The Ministers endorsed the Work programme on S&DT as set out in the Decision on Implementation-Related Issues and Concerns in the Doha Ministerial Declaration. As per this work programme the CTD is instructed to perform, what can be divided into six tasks (along with their deadlines), as follows:

1. Identify mandatory and non-mandatory S&DT provisions in the existing Agreements (by early December 2001).
2. Consider the legal and practical implications for developed and developing Members of converting non-mandatory S&DT into mandatory provisions (by way of inputs received from Members by February 2002).
3. Identify those non-mandatory provisions that members think should be mandatory (by March 2002, on the basis of inputs received from Members in February 2002).
4. Examine ways in which S&DT provisions can be made more effective (by July 2002, after considering proposals and drafting recommendations).
5. Examine ways in which developing countries, in particular the least-developed countries, may be assisted to make best use of S&DT provisions (by July 2002, after considering proposals and drafting recommendations).

6. To consider how special and differential treatment may be incorporated into the architecture of WTO rules (not sure - by July 2002, after considering proposals and drafting recommendations).

In its first meeting in January 2002, the trade negotiating committee – the body responsible for overseeing the Doha Round negotiations- decided that the mandate on S&DT would be dealt with in the Special sessions of the Committee on Trade and Development. Hence the above tasks were carried out in these Special sessions.

The July deadline was not met, with the Members not being able to arrive at a consensus on any recommendations for a decision, except for an agreement by the General Council to establish a monitoring mechanism for S&DT. The specifics of the functioning and structure of the monitoring mechanism, was acknowledged to be under continued discussion in the Special sessions of the CTD. The deadline for all other recommendations was extended to December 31, 2002, which too ended in a stalemate, with the Chair to the General Council remarking, "All efforts to find a common ground to Members' differences had been unsuccessful".

A new deadline was set for February 10, 2003. On February 10, 2003, the CTD, by consensus adopted a report, recommending the General Council to provide clarification, on the Doha mandate on S&DT, "as it considers appropriate". The General Council, which met on the same day, failed to adopt that report. According to ICTSD and IISD (February 2003), "The US, the European Union, as well as Australia, reportedly had a hand in preventing the report's adoption – citing the bad precedent they felt requesting such a clarification would establish".

The deadlock in the negotiations on S&DT brought to light the 'source' of differences that exist between Members on the Doha mandate on S&DT. Primarily, it is argued, that the main issue of contention arises from the different interpretations of Members of the Doha mandate on S&DT. Developing countries, as a group, believe that the existing mandate on S&DT, clearly calls for meaningful changes in the language of the existing WTO Agreements, in order to make existing S&DT provisions more effective. This would entail re-negotiating components of existing Agreements that is believed to be either causing more harm than good, or that in no way confers preferential treatment to the developing countries, who are the unequal players. Developed countries, on the other hand, believe that language changes in the existing WTO Agreements can occur only in the context of fresh negotiations which would imply that

developing countries have to be prepared for a new set of trade offs. They do not consider the work of the Special sessions to be negotiations and hence are not prepared for any changes that alter the existing "balance of Members' rights and obligations" within the WTO framework (ICTSD and IISD, February 2003).

Developing countries also feel that in line with the Doha mandate, the current work programme should consider only agreement specific proposals. Developed countries, on the other hand, feel that there should be detailed discussions on the broader 'principles and objectives' of S & DT. They are willing to consider some derogations for some countries at lower levels of development for some period of time.

Presently, there is no explicit definition of a 'developing country' although LDCs are defined according to the UN criterion. Any country can consider itself developing country and 'self-select' itself to benefit from the S&DT provisions. One of the main stumbling blocks in the current debate on S&DT is the question of which country will be eligible for SDT (Melamed, 2003).

Developed countries have stressed on incorporating the concepts of both differentiation and graduation, i.e., providing different levels of flexibility to members at different levels of development (differentiation) and establish some criterion for countries to 'graduate' out of flexibilities (graduation). They are adamant not to provide S&DT unless it's to a well determined specified group of countries. Some developing countries agree with the concept of differentiation, but feel that the actual mandate must be fulfilled first. These divergent views have contributed to the deadlock.

The proposal for establishing a monitoring mechanism was the only proposal that was agreed accepted by the time of the July 31 2002 report. However there are deep conflicting views between developed and developing countries on the role of such a monitoring mechanism. Developing countries feel that the monitoring mechanism ought to monitor the effective implementation of the S&DT provisions. On the other hand, as per the developed countries, such a mechanism would monitor the effectiveness of the S&DT mandate in integrating Members into the multilateral trading system and would also elaborate in the cross cutting issues.

In April 2003, the new Chairman of the General Council, Ambassador Perez del Castillo, decided to proceed on the premise that "all 88 proposals will be addressed, "without prejudging the results". The developing countries' request for clarification of the Doha mandate on S&DT was in a way brushed aside. However, Ambassador Perez del Castillo insisted, "progress was best served by focusing exclusively on the 88 agreement-specific proposals, as opposed to the cross-cutting ones" (ICTSD & IISD, August 2003). These 88 proposals were divided into three categories. The 38 proposals in category I saw a number of revisions in its language, the outcome being an agreement, in principle, on about 17 of them. Nothing concrete seems to have emerged from the discussions on the other 38 proposals in Category II. As regards Category III proposals, a developing country delegate indicated that as of early August "not a single discussion on Category III proposals had take place so far" (ICTSD and IISD, August 2003).

What Cancun holds for the broader S&DT mandate remains to be seen. Will they focus on the agreement-specific proposals or will they discuss the crucial crosscutting issues and monitoring mechanism? (ICTSD and IISD, August 2003).

### The key general considerations with regard to S&DT in WTO Agreements

Developing countries have expressed the following general considerations with the regard to the existing S&DT provisions in the WTO Agreements:

- Most provisions are voluntary and not legally binding. In this context, many developing countries have proposed that S&DT provisions be made mandatory and legally binding, and also subject to the dispute settlement system of the WTO. A group of

developing countries have proposed a framework agreement on S&DT, which would be an overarching agreement setting out principles which will apply to all specific agreements. Many developed country commitments are too broad or general in nature to be of any practical relevance.

- As per the WTO classification, the existing S&DT provisions, across the WTO agreements are in one or more of the following forms: Provisions aimed at increasing the trade opportunities of developing countries; Provisions under which WTO Members should safeguard the interests of developing country Members; Flexibility of commitments, of actions, and use of policy instruments; Transitional time periods; Technical assistance; and Provisions relating to Least-Developed country Members.

However, in the classification above, there are no S&DT provisions that would enable developing countries to overcome the 'anti-developmental impact of several parts of the WTO Agreements themselves' (Singh, 2003, p.7). Some WTO Agreements, such as the TRIMS and TRIPS, are not conducive to the development interests of the developing countries, who should not have accepted them in the first place<sup>1</sup>. The textile quotas under the ATC Agreement, and the agricultural support schemes under the Agreement on Agriculture, are in fact considered as S&DT in favour of industrialised countries.

- The commitments aimed at addressing developing countries' institutional constraints were made without serious considerations of how they will be implemented. For example, all S&DT related to setting of transition periods for the implementation of the various WTO Agreements. According to Michalopoulos (2003) these were set as part of the bargaining process at the late stages of the UR negotiations and without much involvement of developing country officials with how long it takes to build institutional capacity where it is inadequate or totally lacking. The time limits of extensions have passed in some cases without any evidence that the country has been successful in institution building.

### Conclusion

In order to gain on S&DT issues, developing countries will almost inevitably have to make concessions elsewhere, such as over the decision to launch negotiations on the Singapore issues. There is a strong likelihood that developing countries will end up paying a high price for a few gains on S&DT at Cancun. Hence the original intention for an early decision, as rightly brought out by Melamed (2003), on key development concerns has been lost.

S&DT has an inherent potential for economic development. However procedural issues and agreement specific issues have dominated the discussion in the run-up to the Cancun Ministerial. For the benefit of developing countries, the way forward should focus on ways of threading SDT into the existing WTO architecture.

### References:

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Melamed (2003), "Doing Development at the World Trade Organisation: The Doha Round and Special and Differential Treatment", in Stevens C. (Eds), , *Special and Differential Treatment in Terms of Trade*, Vol. 34 No. 2, April 2003.

Michalopoulos (2003), "Special and Differential Treatment in Agriculture: Proposals for a Development Round", in Stevens C. (Eds),, *Special and Differential Treatment in Terms of Trade*, Vol. 34 No. 2, April 2003.

Singh (2003), "Elements for a new paradigm on Special and Differential Treatment: Special and Differential Treatment, The Multilateral Trading System and Economic Development in the 21<sup>st</sup> Century", Working Draft for ICTSD-GP International Dialogue held on 6 & 7 May, Switzerland.

### Endnote:

<sup>1</sup> The very fact that they did reflects the economic and political weakness of the developing countries in the "lost decade" of the 1980s.

### CUTS-CITEE Issue Papers

No. 1..... Implementation Issues	No. 7..... Investment
<b>No. 2..... Special &amp; Differential Treatment</b>	No. 8..... Trade Facilitation
No. 3..... Movement of Natural Persons	No. 9..... Transparency in Government Procurement
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