



Doha Madate:

"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."

(Paragraph 44 of the Doha Ministerial Declaration)

Special and Differential Treatment

Special and differential treatment (SDT) was once considered the developmental cornerstone of the Doha Round. It was hoped that the negotiations mandated under the Doha 'Development' Agenda would enable developing countries to gain more from WTO membership and better integrate WTO rules into domestic policy. To this end, SDT was to be made more "precise, effective and operational" through better implementation, technical assistance and capacity-building. Members also agreed to seek out new ideas on the unique challenges faced by least-developed countries (LDCs) and small economies.

In the wake of the 2003 Cancun Ministerial Conference, however, many of the so-called 'development issues' have been put on the back burner. Some delegates suggest that the lack of movement calls into question the spirit of the Doha negotiations as a 'development round'. Others argue that the negotiations on agriculture, non-agricultural market access (NAMA) and services have overtaken negotiations on SDT in the Committee on Trade and Development Special Session (CTD-SS). The challenge lies in ensuring that all parts of the Doha Round deliver benefits to developing countries - including the CTD-SS negotiations on SDT provisions, as well as market access outcomes in agriculture, NAMA and services - while strengthening rather than weakening the rules-based multilateral trading system.

Special and Differential Treatment

Negotiations in the CTD-SS have in 2005 moved away from earlier debates on the relative priority to be given to agreement-specific proposals *vis-à-vis* cross-cutting issues. In the first few months of the year, Members struggled to define an approach that would enable both sets of issues to be addressed. Several Members, including a number of developed countries, said that cross-cutting issues had to be addressed as a priority. On the other hand, several other Members suggested that the lengthy discussions on the relative priority of agreement-specific versus cross-cutting issues - which ran from April 2004 until spring of 2005 - had distracted attention away from the review of SDT that was mandated in Doha and supported in the 'July Package' of 2004. The approach presented by CTD-SS Chair Faizel Ismail of South Africa in December 2004 attempted to address both sets of issues, but in May 2005 Members decided to focus for now on agreement-specific proposals in the hope of making concrete progress on the mandate given to the group in the run up to the Hong Kong Ministerial.

In particular, since May 2005 Members have been examining five agreement-specific proposals from least-developed countries (LDCs), as well as proposals from the African Group. Negotiations, however, have been difficult. In July and September 2005, Members were unable to agree on the LDC and African amendment proposals, with many calling for them to be reworded to better address the needs of their proponents. The stalemate on the proposed texts can be explained at least partially by the fact that many Members think the texts do not reflect or address the underlying needs of their proponents and run contrary to the non-discrimination pillars of a multilateral trading system. This has led some to conclude that achieving common approaches to cross-cutting issues will resolve the imperative of accommodating different levels of development and needs without compromising on the essentials of the system.

Background

The relationship between international trade policy and rules and national development objectives and strategies is at the heart of the WTO negotiations on SDT. The concept of more favourable treatment for developing countries in the multilateral trading system stretches back to the earliest years of the General Agreement on Tariffs & Trade (GATT), but the form that such treatment has taken within trade rules has changed over time. The WTO agreements contain approximately 155 provisions on SDT, aimed at enabling participants in the WTO to avail themselves of the rights provided while observing their obligations. They stem from a negotiated acceptance of the need to include Members with diverse capabilities, and in particular those with disadvantages, as full participants in the multilateral trade system.

During the Uruguay Round, the concept of SDT changed from one of providing a range of flexibilities and 'spaces for development policy' based on economic criteria to one of time-limited derogations from the rules, with more favourable treatment regarding tariff and subsidy reduction commitments, and more generous thresholds in the application of market defence measures (i.e. countervailing and anti-dumping duties).

At the same time, the WTO Agreements cover a much wider variety of fields than did the GATT, many of which reach beyond borders to regulate fairly central aspects of state economic policy. The SDT provisions that were established to address the challenges that this change in scope posed to developing countries introduced another form of SDT, namely broad but largely unenforceable statements and ideas in favour of development.

As such, SDT can be said to have evolved from an instrument for making trade liberalisation supportive of development (in the GATT) to its current manifestation (in the WTO) as an instrument for helping

developing countries develop the legal and institutional capacity to undertake their trade liberalisation obligations.

This transformation in the nature of SDT reflects a change in the popular understanding of the trade-development relationship. According to the prevailing orthodoxy, increased trade liberalisation is seen as a necessary element of development policy. This school of thought argues that SDT is at best a way of slowly integrating developing countries into the WTO mainstream and at worst damaging.

Developing countries agreed to this change in the Uruguay Round - along with new commitments in intellectual property, services and investment-related measures - in the expectation of benefits from increased market access in agriculture, textiles and clothing, as well as meaningful development-sensitivity from the implementation of SDT provisions. Benefits have for the most part failed to materialise while the novel disciplines are perceived as straitjackets limiting the use of economic instruments for strategic advancement of regions and sectors, as well as the establishment or application of social and economic safety nets. Developing countries' frustration with aspirational statements in favour of development has led them to refocus on the Doha Declaration mandate to make the SDT provisions contained in specific WTO agreements more "precise, effective and operational."

Some developed countries, however, have raised concerns that the extent and effectiveness of SDT is limited because all 'developing' countries, besides LDCs, must be treated the same. This, they say, limits the extent of preferential treatment that can be directed to Members at assorted stages of integration into the global economy, featuring diverse capabilities, heterogeneous sectoral and sub-national conditions and highly dissimilar market sizes. They argue that the debate on cross-cutting issues, such as the principles and objectives of SDT, the issue of eligibility, benchmarking, the monitoring mechanism and enhanced differential treatment would enable Members to apply the special treatment accorded to developing countries in a different way.

Mandated Deadlines

According to the original Doha mandate, the CTD was to report to the General Council "with clear recommendations for a decision" regarding the SDT mandate contained in Paragraph 44 by 31 July 2002. The deadline has been extended and missed three times: to December 2002, February 2003 and July 2005.

Current State of Play

The Trade Negotiations Committee (TNC) originally assigned the mandate on SDT to the CTD-SS in 2001. In May 2003, the Chair of the General Council circulated a list categorising the 88 agreement-specific proposals put forward by developing countries. In Category I were 38 proposals on which agreement was seen to be possible before Cancun, owing either to existing support or their urgency. Category II comprised another 38 proposals that were sent to relevant WTO bodies in late May 2003. Category III included the 15 proposals on which delegates had the most difficulty in finding consensus. Twenty-eight agreement-specific recommendations were included in Annex C of the Cancun Draft Ministerial text. However, the failure of the Ministerial meant that the 28 recommendations were left un-adopted.

As a result of the post-Cancun focus on agriculture, non-agricultural market access, cotton and the Singapore issues in late 2003 and early 2004, discussions on SDT did not begin again until April 2004, when Members began a one-year attempt to clarify how to prioritise agreement-specific and cross-cutting issues. Chair Ismail asked Members what they wished to do with the proposals on which they have already agreed in principle; how the current discussions on SDT could be made more productive; and what suggestions they had on a way forward. Slow progress on how to proceed, as well a challenge by Latin American and East Asian develop-

ing countries on language that they feared would create a de facto new category of developing countries and thus incorporate the controversial differentiation issue, resulted in the 2004 July Package simply instructing the CTD-SS to “expeditiously complete the review” by July 2005.

In its October 2004 meeting, the CTD-SS continued discussions on the process to be taken and the balance between agreement-specific and cross-cutting issues. Switzerland proposed a new clustering of proposals around specific underlying themes such as capacity constraints and technical assistance. In addition, the Chair agreed to push the other WTO bodies examining Category II proposals to report back to the CTD, and also spoke hopefully about taking up all 28 recommendations, along with the rest of the Category I proposals, by the end of 2005. At a meeting in December 2004, however, Chair Ismail put forward a new approach to negotiations in an attempt to overcome the disagreement on the relative importance of agreement-specific and cross-cutting issues. The Chair’s ‘situational flexibility’ approach calls for negotiators to cluster agreement-specific SDT proposals on the basis of their motivations or underlying issues. A number of developing countries expressed concerns that the approach gave undue emphasis to cross-cutting or ‘horizontal’ issues and could introduce differential treatment among developing countries.

At a meeting in February 2005, Members decided to move forward with negotiations on agreement-specific proposals, while keeping the Chair’s proposed approach as a reference point. Concerns over how to formalise this process came to the fore when the April meeting of the CTD-SS fell apart after Members were unable to agree to an agenda that allocated a full day of a two-day meeting to cross-cutting issues. The proposed agenda reportedly would have divided all the cross-cutting and agreement-specific proposals into two broad categories - ‘flexibility’ and ‘capacity-building’. The entirety of the April meeting would have focused on the proposals in the flexibility category and examined agreement-specific proposals on the first day and cross-cutting on the second day, with a May meeting looking at capacity-building proposals. Several developing countries including India, Malaysia, Mexico, Colombia and Peru complained that they had not been adequately consulted about this classification. They expressed fears that structuring work along such lines would shift negotiations towards cross-cutting issues instead of ensuring that Members focus their attention on agreement-specific proposals, arguing the latter had a stronger mandate under the Doha Declaration to deliver concrete outcomes within the negotiating timeframe. As a result, they refused to accept the agenda and the meeting adjourned early.

Following extensive consultations, meetings in May 2005 moved ahead by looking at five agreement-specific proposals from LDCs with the understanding that Members could bring up cross-cutting issues as solutions to these proposals as appropriate. This was the first time that the agreement-specific proposals had been examined in earnest by the group in the two years since the Cancun Ministerial. Members suggested that these proposals needed to be redrafted in order to update them after the July Package and other developments. A number of developed countries also added that LDCs would have to make at least some commitments and could not expect to receive perpetual exemptions, since the objective of WTO Membership is to integrate countries, including LDCs, into the multilateral trading system. LDCs retorted that the intention of their proposals was to address the costs of implementation of WTO disciplines. The result was that LDCs were asked to redraft their submissions to better address their underlying needs. These new versions were presented in June 2005. Members criticised the new texts, arguing that the changes were largely cosmetic and the proposals would benefit from further redrafting to make them clearer and ensure they addressed the stated needs of the proponents. Members also raised concerns about the ‘automaticity’ of some of the exemptions in the proposals. Despite eleventh-hour marathon negotiations on the LDC proposals, Members were unable to deliver any texts for the July 31 2005 set deadline set a year earlier.

Since July 2005, LDCs have asked for some time to reconsider their proposals, meet bilaterally with countries that have expressed concerns and reword their proposals accordingly. Meanwhile, at informal consultations in September and in a formal meeting in October, Members looked at the African proposals but encountered many of the same difficulties in terms of clarifying the language and intent behind the submissions. Consequently, developing countries have been questioned on the objectives of the proposals and on whether they were prompted by particular challenges in implementing the WTO agreements they sought to amend. However, LDCs and African countries are struggling to convert their current texts, which some describe as vague, into proposals that deliver concrete changes to WTO agreements. As the Hong Kong Ministerial Conference draws closer, intensive meetings on crucial topics such as agriculture, NAMA and services as have underlined their limited negotiating capacity. When deciding whether to struggle with clarifying the language of SDT proposals or to prioritise negotiating on higher-profile topics, many countries have expressed their preference to focus on more ‘deal-breaking’ negotiations in other bodies, many of which take up the issues raised in the SDT negotiations and have important developmental implications.

Looking Forward.

It appears that for the time being the debate has cooled over whether cross-cutting issues, such as the principles and objectives of SDT, eligibility and differentiated treatment, are part of the Doha mandate. Much as the new focus on agreement-specific proposals is what developing countries had hoped for, actual examination of the text is revealing that the proposals address many cross-cutting problems. As such, it may be worth considering whether small textual changes in specific WTO Agreements can address the broader development needs that have motivated developing countries to bring forward new text. If the proposals are to make SDT more operational, they must address the

needs of developing countries in a targeted and enforceable way. This may imply narrowing their scope and level of ambition. However, it may also imply that systemic issues that cut across agreements pose problems for the effective treatment of developing countries in the WTO. In this case, such issues would need to be addressed hand-in-hand with specific textual changes.

Most of the 'easier' category I proposals have already been dealt with through inclusion in the 28 texts that were agreed pre-Cancun, while the 38 category II proposals remain with the respective negotiating bodies. As a result, most of the proposals being currently considered by CTD-SS belong to the 'difficult' category III proposals, and the political will to agree on the broad aspirations expressed in the LDC and African Group proposals remains lacking. However, the incentive to renegotiate and re-draft the texts may emerge if successful outcomes can be achieved in agriculture, NAMA and services negotiations.

LDCs and Small Economies

Although they receive less attention, the work programmes for LDCs and small vulnerable economies are also active areas of negotiation at the WTO. Key issues in the WTO Sub-committee on Least-developed Countries since the Cancun meeting have included technical assistance for acceding LDCs and supply-side

problems, market access issues (particularly in relation to Australia and Canada), Integrated Framework-related issues and, most recently, the phase-out of textiles and clothing quotas (see Doha Round Briefing Number 4).

In the Committee on Trade and Development Dedicated Session (CTD-DS), Members have been struggling to address the needs of small and vulnerable economies. The mandate in the Doha Declaration to "frame responses to the trade-related issues identified for the fuller integration of small vulnerable economies into the multilateral trading system" has proven difficult given the Declaration's order to "not create a sub-category of WTO Members". In February 2005, Members agreed to adopt a three-step strategy presented by Chair Ambassador Trevor Clarke of Barbados. The first step entails the consideration of characteristics to identify what can be accepted as 'small, vulnerable economies'. Step two, which was eventually combined with step one, involves the consideration of the trade-related problems that could reasonably be attributed to those characteristics, while step three would require framing responses to the problems identified. The proponents of the small economies work plan - including fourteen ACP countries - presented a paper (WT/COMTD/SE/W/12) in February 2005 that outlined some 17 characteristics and problems that, they suggested, would enable Members to understand the structural handicaps that prevent small economies from reaping the full benefit of the multilateral trading system. In May 2005, the proponents tabled another proposal (WT/COMTD/SE/W/13) to jump-start negotiations on solutions to problems.

In response to reactions to their May 2005 proposal, at a 17 October 2005 meeting the 21 proponents of the small and vulnerable economies work plan tabled a further proposal (WT/COMTD/SE/W/14). It outlines a two-track approach in which proponents would table submissions on how their particular problems could be addressed directly to the relevant WTO bodies, while the CTD-DS would continue to monitor the progress of these proposals. The proposal also cites submissions that have been made by its sponsor countries to the WTO negotiating groups on agriculture, non-agricultural market access (NAMA) and rules (TN/RL/GEN/57/Rev.2) since July 2005. Other Members have responded favourably to the two-track approach, which has been advocated by developed countries in the CTD-DS for several years. During informal negotiations aimed at drafting preliminary text for the Hong Kong Ministerial Conference, however, Members continue to grapple with how to put forward substantive content that would promote the interests of small and vulnerable economies without introducing differentiation among developing countries. It is the extent to which the CTD-DS is able to agree on the text, along with how the proponents' submissions are dealt with in the negotiating bodies, that will determine how much of this work will be integrated into the Ministerial outcome.

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