

Sustainable Development and Trade Issues

ICTSD Resource Paper No. 4



INTERNATIONAL CENTRE FOR  
TRADE AND SUSTAINABLE  
DEVELOPMENT

**Strengthening Special and Differential  
Treatment in the WTO Agreements:  
Some Reflections on the Stakes for African Countries**

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February 2003



**Published by**



**International Centre for Trade and Sustainable Development (ICTSD)**

International Environment House

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## **Strengthening The Special And Differential Treatment in the WTO Agreements: Some Reflections On the Stakes For African Countries**

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ISSN: 1681-8954



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## FOREWORD

A leading commentator on the GATT-WTO system, Robert Hudec, remarked a decade ago that "the history of the GATT's relationship with developing countries is primarily the history of demands for special status." Indeed, there is nothing that has so sharply defined the relationship between developing countries, particularly the poorest amongst them on the one hand, and the developed countries on the other, in the multilateral trading system, as have, the demands for special and differential treatment (S&D). The S&D concept was evolved by the Argentinean economist, Raul Prebisch, in the context of trade between unequal partners, and when trade and the rules, rights and obligations of that trade involved only the crossing of goods across borders. It was a move to ensure that the developing countries would be able to export to markets of developed countries on a preferential basis as compared to suppliers from other developed countries, and to compete on an equal basis with domestic suppliers. Over the years, different dimensions have been added to the concerns as originally expressed.

The debate goes on to date, and is even more divisive now, than it has ever been, with some developed countries insisting on the differentiation of the rights and obligations between and amongst developing countries. In the ongoing Doha Round negotiations, there have been three missed deadlines, an acknowledgement from the Chair of the Committee on Trade and Development (CTD) that "all efforts to find a common ground" had not been successful at the close of 2002 and quite possibly a stalemate in the next session of the General Council with regard to the adoption of a report that would require the General Council to give its determination "as appropriate" on the differences between Members. It is with this kind of background in mind that ICTSD seeks to contribute to this debate by providing an easy to read account and analysis of some of the issues that have been prominent in this debate. African countries have been at the forefront, both in the negotiations and the demands for enhanced and effective S&D provisions. Some of the most important contributions to the debate, and understandably so, have come from the African Group. For instance the only proposal accepted fully by Members in the July 31 2002 CTD Report was from the African Group demanding a monitoring mechanism for S&D, although as is wont to happen, the form it should take has proven to be contentious too.

In this paper, Dr. Francis Mangeni rests his analysis on the question whether developed countries are willing and able, first, to support changes to WTO rules, and second, to put their resources into programmes, that directly address the constraints developing countries face in seeking to implement and comply with their obligations and to equitably or competitively benefit from opportunities the multilateral trading system is meant to avail. He states that the characteristic nature and outcome of the debate will depend on to what extent the answer to this question is in the affirmative. He states that the characteristic nature and outcome of the debate will depend on to what extent the answer to this question is in the affirmative. He goes on to tackle many of the controversial issues such as the question of graduation, the rationale for a monitoring mechanism and the ever-thorny issue of technical assistance and capacity building.

We at ICTSD will continue to inform the debate on this important subject and to add the sustainable development perspective to the issues, within the context of the several programmes that focus on the special needs of developing countries, through this and other research and dialogue components of our various programmes.

*Ricardo Melendez-Ortiz*  
Executive Director



## **STRENGTHENING THE SPECIAL AND DIFFERENTIAL TREATMENT PROVISIONS IN THE WTO AGREEMENTS: SOME REFLECTIONS ON THE STAKES FOR AFRICAN COUNTRIES**

### **1. THE MANDATE ON SPECIAL AND DIFFERENTIAL TREATMENT PROVISIONS**

When the Ministers agreed that the WTO Committee on Trade and Development (CTD) should review *all* special and differential treatment (S&D) provisions with a view to strengthening them, and to making them more precise, effective and operational, they understood that if this exercise were to be successfully undertaken changes would have to be introduced. The Ministers reaffirmed that S&D provisions were integral to the *WTO Agreement* and noted the concerns that had been expressed on how the provisions had not satisfactorily addressed the constraints faced by developing countries.<sup>1</sup>

#### **1.1 The tasks of the CTD**

The Ministers further, specifically instructed the CTD to:

- To identify the mandatory and the non-binding S&D provisions,
- To consider the legal and practical implications for developed and developing countries of converting non-binding S&D provisions into mandatory provisions,
- To identify the non-binding S&D provisions that Members consider should be made mandatory provisions,
- To examine additional ways for making S&D provisions more effective,
- To consider ways (including improved information flows) for assisting developing countries to best utilise S&D provisions, and
- To consider how S&D provisions may be incorporated into the architecture of WTO rules.<sup>2</sup>

On 14 December 2001, the CTD agreed upon and adopted a work programme for accomplishing these tasks.<sup>3</sup> The work programme was modelled along the tasks in paragraph 12 of the *Decision on Implementation Issues and Related Concerns*, putting dates to and assigning responsibilities in stages to be attained, as follows:

- The WTO secretariat was to prepare documents, identifying the mandatory and non-mandatory S&D provisions by early December 2001, giving an overview of the operation of S&D provisions by January 2002, giving factual information on the legal implications of making S&D provisions mandatory by February 2002, and giving information on utilisation of S&D provisions by February 2002.

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<sup>1</sup> Paragraph 44 of the Declaration of the 4<sup>th</sup> Session of the Ministerial Conference. WTO document WT/MIN (01)/DEC/1

<sup>2</sup> Paragraph 12.1 of the Decision on Implementation Issues and Related Concerns, adopted by the 4<sup>th</sup> Session of the Ministerial Conference. WTO document WT/MIN (01)/17

<sup>3</sup> WTO document WT/COMTD/36

- Members were to give input by February 2002 on the legal and practical implications of making S&D provisions mandatory, and identify the S&D provisions they wanted made mandatory by March 2002.
- From March to July 2002, the CTD was to consider and draft recommendations to the General Council in time for the July 2002 deadline.
- It was felt that work on incorporating S&D provisions into the architecture of WTO rules could be taken up beyond the July deadline.
- The July deadline was not met and a new one, which was also missed, was set for December 31 2002. Members were unable to agree on any recommendations for a decision, prompting the Chair to remark after the final meeting of the year, last year "all efforts to find a common ground to Members' differences had been unsuccessful". A new deadline was yet again set for February 10 2003.
- On February 10, the CTD agreed by consensus adopted a report recommending that the General Council provide clarification "as it considers appropriate" on the S&D mandate given by Ministers at Doha. A meeting of the General Council on the same day however failed to adopt the report which has made it difficult to establish the way things will proceed.

The Trade Negotiations Committee, the body overseeing the work programme agreed under the *Declaration* of the 4<sup>th</sup> Session of the Ministerial Conference<sup>4</sup>, decided that the work on S&D should be done in special sessions of the CTD, and accordingly established the Special Session of the CTD to carry out the ministerial mandate and to accomplish these tasks.

## 1.2 Emphasis on Respect for Adopted Timeframes

As pointed out, these tasks were supposed to be completed by July 2002, though the incorporation of S&D provisions into the architecture of WTO rules was to be undertaken in the context of the broad work programme of the WTO.<sup>5</sup> By 31 July 2002, however, the CTD was in a position only to report the number of proposals, and to briefly describe the subjects on which the proposals were made.<sup>6</sup> More than 11 proposals had been made, inclusive of additional proposals and statements of delegations that were circulated as addendums to the proposals, as well as the late communication by the European Communities of 26 July 2002.<sup>7</sup>

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<sup>4</sup> The Declaration, in paragraph 46, established this committee in the following terms:

"46. The overall conduct of the negotiations shall be supervised by a Trade Negotiations Committee under the authority of the General Council. The Trade Negotiations Committee shall hold its first meeting not later than 31 January 2002. It shall establish appropriate negotiating mechanisms as required and supervise the progress of the negotiations."

<sup>5</sup> Paragraph 12.1(iii) of the Decision on Implementation Issues.

<sup>6</sup> Report of the Chairman of the Special Session of the CTD, to the General Council. WTO document TN/CTD/3.

<sup>7</sup> The proposals were the following: TN/CTD/W/1 from Cuba, Dominican Republic, Honduras, India, Indonesia, Kenya, Pakistan, Sri Lanka, Tanzania & Zimbabwe; TN/CTD/W/2 from Cuba, Dominican Republic, Egypt, Honduras, India, Indonesia, Kenya, Mauritius, Pakistan, Sri Lanka, Tanzania and Zimbabwe; TN/CTD/W/3/Rev.1, TN/CTD/W/3/Rev.2 and TN/CTD/W/3/Rev.1/Add.1 from the African Group;

Some of them were joint proposals, namely, those by the Africa Group<sup>8</sup>, the Consultative Group of Least Developed Countries<sup>9</sup>, and the Like Minded Group. The gist of the July recommendations of the CTD was simply for the General Council to extend the time frame for the review of S&D provisions to 31 December 2002. It is absolutely important that the review should now be finally completed and more concrete and complete recommendations made to the General Council as envisaged in the ministerial instructions to the CTD.

### 1.3 The CTD recommendations in July

The July CTD Report to the General Council made the following recommendations<sup>10</sup>:

- The timeframe for the CTD to complete its work be extended to 31 December 2002, during which time the special session of the CTD would deal with the proposals made – these were classified as Agreement-specific, cross-cutting and institutional proposals;
- The General Council agree to establish a monitoring mechanism for S&D, while the special session of the CTD continues to elaborate the functions, structure, and terms of reference of the mechanism;
- The General Council instruct the special session of the CTD to submit to the CTD the proposals on technical and financial assistance and on training, made by the Africa Group. It would be up to the CTD to take on elements of the proposals that it agreed with; and
- The General Council instruct the special session of the CTD to consider how S&D may be incorporated into the architecture of WTO rules.

### 1.4 Assessment of the July CTD's report

When the CTD's report, with recommendations, was presented to the General Council, developing country delegations expressed disappointment at the lack of progress in the review exercise. The co-ordinator of the Africa Group pointed out that there wasn't a single finalized recommendation and further that all the recommendations sought additional time to continue working on the proposals tabled. Developed country delegations, particularly the United States, in turn expressed some disappointment at the assessment that developing countries were making of the progress in the review exercise.

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TN/CTD/W/4 and TN/CTD/W/4/Add.1 from the LDCs; TN/CTD/W/5, TN/CTD/W/5/Add.1 and TN/CTD/W/5/Add.2 from Paraguay; TN/CTD/W/6 from India; TN/CTD/W/7 from Thailand; TN/CTD/W/8 from St. Lucia; TN/CTD/W/9 from the United States; TN/CTD/W/10 from Hungary; TN/CTD/W/11 from Japan, and TN/CTD/W/13 from the European Communities.

<sup>8</sup> TN/CTD/W/3 series

<sup>9</sup> TN/CTD/W/4 series

<sup>10</sup> Paragraphs 14 to 19 of WTO document TN/CTD/W/3.

## 1.5 The CTD's Role in Delivering and Outcome

A major objective now about making the best of this mandate to the CTD within the prescribed timeframe, is how best to reform the system of S&D in order to resolve the concerns over the failure to properly address the constraints faced by developing countries and the concerns over the unsatisfactory nature of the provisions. A good outcome of the exercise should ideally include:

- Strong S&D provisions that are readily and fully implemented and complied with
- A mechanism for monitoring the provisions; the mechanism would have to include a built-in competence for the evaluation of the provisions and the adoption of recommendations for the improvement of their utilisation, and
- A coherent relation of S&D provisions to concrete or area-specific concerns<sup>11</sup>, through adopting new overarching rules: to strengthen the operation of existing S&D provisions, to govern the nature of and conditions on which any new S&D rules may be included in future Agreements and other legal and political instruments of the WTO, and to streamline development into the various WTO Agreements.

## 1.6 Additional ways for effective S&D provisions

The exercise of coherently relating S&D provisions to area-specific concerns should be considered as coming under the ministerial mandate to find “additional ways” for making S&D provisions more effective.<sup>12</sup> This should be contrasted with the mandate to incorporate S&D provisions into the architecture of WTO rules within the context of the entire work programme.<sup>13</sup> This latter mandate may be construed as requiring stronger and better S&D provisions in the negotiations agreed under the Declaration of the 4<sup>th</sup> Session of the Ministerial Conference.

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<sup>11</sup> Area-specific concerns could include, technical and financial assistance, training, transition periods, coherence in global economic policy-making, and the legal standing of S&D provision as mandatory or otherwise.

<sup>12</sup> Sub-paragraph (ii) of paragraph 12.1 of the Decision on Implementation Issues and Related Concerns.

<sup>13</sup> Id. Sub-paragraph (iii).

## **2. THE CONCEPT OF SPECIAL AND DIFFERENTIAL TREATMENT IN THE WTO**

### **2.1 The core issue**

When everything is said and done, the importance of S&D comes down to a simple question: are developed countries willing and able, first, to support changes to WTO rules, and second, to put their resources into programmes, that directly address the constraints developing countries face in seeking to implement and comply with their obligations and to equitably or competitively benefit from opportunities the multilateral trading system is meant to avail? It will all depend on the extent to which the answer to this question is in the affirmative. For in the review exercise it is developed countries now resisting any changes to S&D provisions proposed by developing countries as demanders. This may be considered a perhaps surprising turn of events, given the supposedly generous manner in which developed countries profusely accepted S&D provisions on technical assistance in the *Declaration* of the 4<sup>th</sup> Session of the Ministerial Conference and the language of the mandate on the review of all S&D provisions.

### **2.2 Alternatives to resource transfers**

The recent history of development assistance, going back to the 1960s, shows that the targets set have consistently remained unmet. Developed countries and international organisations have been reluctant or unable to transfer resources to most developing countries in the required amounts in order to break the processes that generate poverty, disease and ignorance and to achieve acceptable rates and levels of economic development. Instead, debt servicing and returns on footloose investments, among others, have resulted in net resource transfers from developing to developed countries.

The essence of S&D should therefore not be the availability of resources from developed countries and international organisations. This should remain as merely a component. The essence of S&D should be reconceptualised through changes to WTO rules. The rules will address the financial aspects, but far more importantly they should fully ensure a balance of rights and obligations, equity, and the promotion of the development prospects of developing countries.

### **2.3 Imbalances in domestic capacity**

It is a widely accepted fact that Developing countries are relatively disadvantaged compared to their developed counterparts in terms of the resource capacity, to implement and comply with obligations, to make the best of the multilateral trading system, and in pursuing the objective of economic development.

Implementing<sup>14</sup> obligations into the domestic system is a costly exercise depending on the nature and scope of the changes that are to be introduced, and this has resource implications

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<sup>14</sup> Implementing as used here refers to the incorporation of international obligations into the domestic legal system, and establishing new institutions or making changes to them as may be required under new obligations.

for developing countries. When the *WTO Agreement* was introduced as the overall framework to regulate the multilateral trading system, developing countries were required to undertake far-reaching changes in their policies, laws and institutions. Without doubt, new obligations arising from negotiations and other processes in the WTO will continually have similar implications.

Complying with obligations is a standing and continuous exercise. Once the obligations are implemented in the domestic system, they have to be administered as part of the workings of the government machinery by, for instance, customs and licensing officials, intellectual property offices, and generally the relevant ministries. This too has resource and institutional implications for developing countries.

While the WTO framework is meant to open up and guarantee market access opportunities, developing countries generally face supply side and other constraints. Market access opportunities would be tangibly beneficial for developing countries that can take them up through competitive production and exportation to other WTO Members. The supply side constraints most developing countries face, mean that market access opportunities are not satisfactorily taken up in a manner that critically generates the desirable levels of domestic economic growth and development.

The other constraints in this regard could include the cumbersome or prohibitive technical, health and procedural requirements that developing country exports face, notwithstanding or partly explaining the very low share of developing countries in international trade. The WTO rules on technical standards, health standards, customs procedures, and other entry requirements, have not been an adequate solution to the many impediments developing country exports face.

## **2.4 Economic development and public policy**

International trade is not an end in itself. It should primarily be a welfare generating activity. A fundamental objective of the WTO as an institution regulating international trade relations is to improve living standards for the people, particularly in developing countries. The principles or mechanisms for attaining these objectives are to reflect the different circumstances of developing countries.

For instance, reciprocity is not to be strictly applied to developing countries. That is, developing countries are not to be expected to give equivalent concessions for concessions developed countries make. In practical terms, this means that developing countries should be left with wide policy space or flexibility for protecting public policy objectives, such as the development of infant or strategic industries in important sectors, and should only implement and comply with obligations consistently with, or without prejudice to, their resource capacity and development needs. Crucially, developed countries should co-operate with developing countries to facilitate the attainment of these objectives. Rough but improvable models for this kind of flexibility would include, the now rather ambiguous Article XVIII of GATT

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Such changes will entail policy changes, to be undertaken in accordance with applicable domestic procedures.

1994; the largely best-endeavour Part IV of GATT 1994; the un-operationalised Articles 4 and 19 of GATS; the unimplemented Articles 7, 8 and 66.2 of the TRIPs Agreement; and the redundant special procedures under the Dispute Settlement Understanding for developing countries.

Such flexibility and public policy objectives will however be meaningless where they are frequently undermined under policies imposed on developing countries under programmes pursued by other international organisations. Coherence in international policy towards developing countries will therefore always be crucial in the utilisation and operationalisation of S&D provisions.

S&D as a concept accepts that international trade relations between countries should be managed in a manner that should guarantee equitable benefits for all but especially for the developing countries. International trade is to be regulated in a manner that addresses the difficulties of developing countries. The WTO Membership is not left to its own devices, the powerful devouring the weak; but it is managed and organised along rules designed to ensure equity for developing countries in international trade to support their rapid economic development.

The Africa Group has had occasion to state the objectives of S&D in the following terms<sup>15</sup>:

“2. Trade is not an end in itself, at least that is what the WTO Agreement states in the objectives agreed by Members in setting up GATT and now the WTO. Trade is to contribute to the improvement of living standards, especially in developing and least-developed country Members. It is a welfare generating activity. It is recognised in this regard that special measures are necessary to assist developing and least-developed country Members achieve a share in international trade that is commensurate with their development needs. This embodiment of special treatment in the core objectives and functions of the WTO as an institution has recognised special and differential treatment as a right for developing and least-developed country Members. The broad context could be the right of developing and least-developed country Members to economic development.

3. One major benefit and function, among others and by way of illustration, of the WTO framework is that it provides a framework for market access for products. Trade is recognised as a significant engine of economic development, a contributor in the attainment of economic development. However, as is well recognised, developing and least-developed country Members do face difficulties in using the WTO framework, in taking up the market access opportunities created; due to their resource and supply side constraints. Also, in implementing new obligations and in complying with many obligations, developing and least-developed country Members operate under enormous financial, institutional, and human resource constraints. They therefore need assistance; and they need flexibility in implementing and complying with obligations. In other words, WTO Members are not at equal levels in terms of resources and capacity in their participation in the WTO framework, especially with regard to meeting the implementation and compliance burdens resulting from the obligations, as well as in sharing in the benefits of the market opportunities supposedly opened up.

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<sup>15</sup> Paragraphs 2 to 4 of WTO document TN/CTD/W/4/Rev.1/Add.1

4. Against this background, special and differential treatment has been accorded to developing and least-developed country Members as a means of assistance, as a recognition of their development needs and the important role of the WTO framework in providing some of the market access solutions required for economic development, with the primary objective of ensuring the improvement of living standards through trade growth and economic development, and through providing for appropriate flexibility in governmental measures and the commencement of or compliance with obligations. This is necessary to support satisfactory or viable rates and levels of economic development. That is the primary objective of special and differential treatment, but this primary objective needs to be stated in more detail and in terms that demonstrate its quite broad scope. The Africa Group proposal attempts to do this in Part II on cross cutting issues.”

According to this view, the objectives of S&D should include according appropriate special treatment to developing countries designed to enable them to beneficially participate in the multilateral trading system in a manner that concretely contributes to the attainment of specific development objectives in the area of trade. In practical terms, this entails increasing and diversifying their exports and availing larger and guaranteed export markets. It entails also addressing the root causes of failure to benefit from market access opportunities that have avowedly been opened up and guaranteed under the multilateral trading system; that is, the bottlenecks to developing and releasing the export potential of most developing countries. These include supply side constraints that inhibit most developing countries, and restrictions maintained in developed countries that keep out or limit exports from developing countries.

## **2.5 The Quest for Rules Suitable to the Attainment of the Development Objectives**

The rules put in place to facilitate the attainment of objectives, and designed to ensure the operation of the relevant principles must be suitable, for there is not much point having rules that are unsuitable as the means. International trade rules will be no exception, if international trade has certain objectives to achieve, in this case improving living standards especially for developing countries, taking into account their resource and development needs. International economic diplomacy has the crucial role of evaluating the trade rules to determine their suitability from time to time. S&D, as fundamentally part of the means for attaining the development objectives of the WTO, is in this sense to be subject to regular and systematically periodic evaluations to determine any appropriate improvements to be made. However, this should entail a broad review of the performance of the entire WTO system in enforcing and adhering to the rules on S&D as well as the suitability of those rules themselves.

It is in the context of such exercises that improvements to be made to the rules and to the system could be determined. Such exercises should not to be narrowly restricted to the reviews of actual utilisation of the rules; the more important problems to be addressed would precisely be the reasons for non-utilisation. Such reasons will in most cases be much broader than possible recommendations of best practices arising from empirical studies of success stories.

### **2.5.1 *Some reasons for non-utilisation***

Some of the causes for non-utilisation are the following:

- (a) Incoherence in global economic policy-making, where the flexibility allowed through S&D is practically denied or proactively discouraged under the standard structural adjustment programmes that the international financial institutions recommend to developing countries that seek their monetary and development assistance, or legally curtailed under bilateral or regional treaties and other arrangements between developed and developing countries;
- (b) The provisions are written in language that makes them difficult or unclear to legally enforce, meaning that in effect the provisions are merely words without effective or practical meaning;
- (c) Shortage of resources to invoke the provisions, such as the provisions on technical and financial assistance in meeting technical and health standards or the provisions on training as a skills building or enhancing exercise, mainly because developed countries or international organisations are supposed to provide the resources and they do not do so in an adequate manner; and
- (d) Public opinion in developed countries and to some extent in developing countries is not strong and loud enough to influence political decisions and results in favour of giving prominence to S&D provisions in bilateral, plurilateral and multilateral negotiations and dealings.

### **2.5.2 *Experience with the rules should be broadly considered***

The above reasons for non-utilisation suggest that addressing the difficulties developing countries face in seeking to utilise S&D provisions, should go beyond the experience with actual utilisation, and look into the legal nature, the economics and politics of S&D as a concept.

- (a) The global governance or coherence aspects of S&D require that international organisations universally accept the importance of the concept and embody it in their core constitutive and operational objectives and programmes. The member states of the international organisations need to have a solid and undoubted political commitment to ensuring and giving prominence to S&D. The commitment will have practical relevance or use if it provides the mandate and parameters of the government representatives in the important processes of the organisations. The secretariats and all administrations of the international organisations need to maintain regular consultations and to pursue their objectives and programmes in the context of an overall aim of ensuring coherence.
- (b) The legal aspects of S&D require that the provisions be clear and create obligations that should be readily implemented and complied with. Like other important obligations in the WTO architecture of Agreements, S&D provisions should be enforceable. And to be enforceable, the language must clearly say so; the parties with the rights and those under the obligations must be clearly designated; the dispute

settlement system must have the competence and the political will and otherwise be disposed to fairly hear and boldly determine the disputes; and WTO Members must understand and clearly agree in unequivocal language that the relevant institutions (the monitoring mechanism<sup>16</sup>, the panels, the Appellate Body, and the Dispute Settlement Body) have the right and the power to require them to comply with judgments, recommendations and decisions on S&D provisions.

- (c) Also, where appropriate (for instance in invoking, trade remedies to protect important domestic industries, and the dispute settlement provisions), simplified or special regimes and procedures should be additionally adopted, specifically for developing countries, in order to reflect their resource constraints and development needs.
- (d) The economic and financial aspects of S&D require that there should be adequate resources to ensure the compliance with and enforcement of S&D provisions. The secretariats and other bodies of the relevant international organisations, including the WTO, should have adequate disposable resources to undertake activities fully in accordance with the applicable S&D provisions. Developing countries should have the necessary resources provided to them, to facilitate the utilisation of S&D provisions. These resources should be both human and financial, and will need to respond to the multifaceted difficulties the developing countries face in the various areas of S&D. These areas include, among others, supply side constraints and product diversification, implementing and productively using transition periods for adjustment and capacity building, developing domestic capacity to promote public policy and international competitiveness, defending and using their rights or flexibility and enforcing obligations owed them, and meeting the standards, customs and other entry requirements especially to developed country markets.
- (e) The political aspects of S&D require that there should be an influential degree of public opinion internationally and in the individual countries to compel governments to give prominence to S&D. Time and again, it has been shown that democratic governments will be influenced by electoral prospects, as well as evolving conventions of international and domestic political conduct or what are reckoned to be required standards of behaviour and morality. A vigilant society can keep governments on their toes. There is therefore the issue of how to shape public opinion in favour of S&D. In this regard, the sociology of government positions will always be an important factor to keep in mind. Civil society organisations, particularly in developed countries, may be instrumental in assisting in influencing the governmental processes relevant to international trade and the WTO. Charismatic leaders may also be helpful.

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<sup>16</sup> At its meeting on 31 July 2002, and the recommendation of the Committee on Trade and Development, the General Council agreed to establish a monitoring mechanism for S&D.

### 3. ELEMENTS OF A LEGAL SYSTEM FOR S&D

A legal system for S&D is necessary in order to provide an overall framework for the effective operation of existing provisions, and for the adoption of new S&D provisions in ongoing and future negotiations. The legal system would have to fully address concerns developing countries have raised about the ineffectiveness of S&D provisions.

A legal system for S&D should contain the following elements:

- **Enforceable S&D.** The provisions for S&D should be clear and undoubted obligations and rights that can be enforced. Experience has shown that anything to the contrary will make them largely ineffective.
- **Necessary resources.** The necessary resources should be secured and earmarked in the context of permanent or standing arrangements. This will include the establishment and maintenance of financial facilities to facilitate the utilisation of S&D provisions that have financial implications.
- **Monitoring mechanism.** There should be a monitoring mechanism to regularly evaluate the effectiveness and utilisation of S&D provisions, and to make recommendations for any appropriate improvements in the rules, and provide a forum for consultations among Members designed to ensure compliance with S&D provisions particularly in respect of obligations towards developing countries.

#### 3.1 The Framework

Overarching S&D provisions to provide the overall framework should address the following specific and general areas of concern for developing countries:

- **Transition periods.** Transition periods should not be the primary form of S&D treatment. The primary form should be in terms of continuous flexibility for developing countries for as long as they remain developing countries. In any case, the duration and content of transition periods should be objectively determined. They should be designed as adjustment periods, and ensure that the necessary resources are secured and earmarked.
- **Objectively determined transition periods.** However, the position that transition periods should be objectively determined should not be considered to mean that S&D, as a broad concept should not apply to developing countries that do not need transition periods. Transition periods are merely an aspect of S&D. (*See box 1*) Further, the position should not mean that transition periods should be short and after their short duration expected to transform developing countries to a level of uniform obligations and rights with developed countries – this would simply be unrealistic and impractical. Uniform obligations may only be expected after an extended period of transition that is objectively determined on the basis of the resource and development needs of

categories of developing countries. The rather mechanical aspects of customs administration procedures should not be advanced as universally applicable examples of short one-year transition periods that work for developing countries.<sup>17</sup> Mechanical customs administrations should be contrasted from broad development policy that is directly impacted upon by other far-reaching WTO Agreements.

**Box 1**  
**Forms of S&D in the Africa Group Proposal**

The Africa Group proposal, in paragraph 5, sets out various forms of S&D as follows:

“5. Provisions in the WTO Agreements show the variety of forms that special and differential treatment takes. Some of these forms include:

- a) Specific regimes or provisions for the right of developing country governments to assist their domestic industries, such as Article XVIII of GATT 1994.
- b) Fast track and flexible regimes or procedures in enforcement of the rights of or against developing countries and in requirements on developing countries, such as the Decisions referred to in the DSU for procedures where developing and least developed countries are involved in the disputes, or the special procedures under the Subsidies and Anti-dumping Agreements.
- c) Waiver for collective efforts among developing countries to accord preferential treatment to one another; usually done in the context of broad programmes for economic cooperation and economic development.
- d) Provision for special measures by developed countries to provide preferential market access for products from developing countries. Part IV of GATT 1994 and the Enabling Clause place emphasis on access to developed country markets for products of export interest to developing countries under provisions that could be made more binding.
- e) Inclusion in the objectives and principles of the agreements in terms of targets to be achieved. Article IV of GATS envisages that developing countries need to have an equitable share in services trade and developed countries should assist them to take up available opportunities. Generally, the principles of the WTO as stated in the preamble to the WTO Agreement include the recognition of the need for positive efforts to ensure that developing and least-developed countries secure a share in the growth of international trade commensurate with their development needs.
- f) Inclusion in the agreements of provisions requiring developing and least-developed countries to undertake only such commitments or obligations as are consistent with their development needs and within their means, such as Part IV of GATT 1994 and the Decision on Measures in Favour of Least-Developed Countries.
- g) Provisions for technical assistance to developing and least-developed countries.
- h) Provisions for transition periods for developing and least-developed countries.

Binding obligations to address important needs. Article 66.2 of the TRIPS Agreement provides for technology transfer to least-developed countries in mandatory terms or under binding provisions.”

<sup>17</sup> The US delegation sought to argue for short and specific transition periods on the basis of the practice under the Agreement on Customs Valuation. She argued also that objectively determining the need for S&D could be related to a requirement or approval of the adoption of market-based development policy. A general comment on the views of the US delegation could be that they seized upon some developing country proposals and construed them out of context, perhaps innocently. Please see WTO document TN/CTD/W/9.

- **Graduation.** The length of transition periods should be objectively determined, as suggested in both the pre-Doha proposal by a group of developing countries<sup>18</sup> and to some extent the Africa Group proposal<sup>19</sup>. Some advanced developing countries may be in a position to take on obligations much earlier than the other developing countries. Secondly, some advanced developing countries may extend preferential market access to other developing countries, on the basis of the Enabling Clause. Graduation could be construed in this context.
- **Resource assistance and capacity building.** While the *WTO Agreement* is replete with technical assistance provisions, as well as the Declaration of the 4<sup>th</sup> Session of the Ministerial Conference, it has become apparent that these provisions have not been implemented or complied with in a satisfactory manner. The provisions have been largely irrelevant to the capacity building needs of developing countries. There is need for a coherent approach to WTO assistance and capacity building in particular.

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<sup>18</sup> Paragraph 15 of WTO document WT/GC/W/442

<sup>19</sup> Paragraph 23 and 24 of WTO document TN/CTD/W/3/Rev.1

## 4. STRONG SPECIAL AND DIFFERENTIAL TREATMENT PROVISIONS

The discussion leading to the 4<sup>th</sup> Ministerial Conference raised the issue of the ineffectiveness of S&D provisions. Work in the CTD<sup>20</sup> had led many delegations to conclude that S&D provisions needed to be strengthened in the context of a fresh approach to the entire concept.

### 4.1 Proposal by a group of developing countries for a framework agreement

A group of developing countries<sup>21</sup> prepared and submitted a proposal, to be considered in the preparations for the Ministerial Conference, for a framework agreement on S&D.<sup>22</sup>

#### 4.1.1 Development and erosion of S&D

The proposal discussed the history of S&D in GATT 1947, setting out the milestones or progress made (*see Box 2*), and how the WTO “eroded” this progress (*see Box 3*). It made the important recommendation that

“10. It is imperative to undertake a thorough review of the concept of S&D, as its basic objective is to create a level playing field for unequal players in the Multilateral Trading System. This should be seen in the establishment of a concrete and binding S&D regime that is responsive to the development needs of the developing countries. There is an urgent need for such S&D regime that mainly focuses on enhancing market access opportunities (for developing countries) and provides policy options aimed at unlocking their growth and development potential. The guiding basis, therefore, should be that:

- (i) The liberalization of trade is not an end in itself but the means to an end, that is, economic growth and development of all Members: and
- (ii) Different levels of development achieved by members require different sets of policies to achieve economic growth and development.”

#### Box 2

##### Proposal by a group of developing countries: S&D milestones

Paragraph 3 mentions the following milestones:

- (a) Modification of Article XVIII of GATT in 1954-55 to include Article XVIII-B which allowed developing countries to use quantitative restrictions for balance-of-payments (BoP) purposes;
- (b) Establishment of UNCTAD and the creation of the Committee on Trade and Development in the GATT in 1964;
- (c) Addition of Part IV on Trade and Development to the GATT in 1965: and
- (d) Adoption of the Enabling Clause in 1979 at the end of the Tokyo Round. This process signified the growing importance of the S&D treatment for developing countries in the multilateral trading system and, at the very least, the political recognition by developed countries of the need for S&D to attract and accommodate developing countries in the system.

<sup>20</sup> The WT/COMTD/W/77 series of documents were initially prepared in the context of the work in the CTD on S&D.

<sup>21</sup> Cuba, Dominican Republic, Honduras, India, Indonesia, Kenya, Malaysia, Pakistan, Sri Lanka, Tanzania, Uganda and Zimbabwe.

<sup>22</sup> WTO document WT/GC/W/442 dated 19 September 2001.

**Box 3****Proposal by a group of developing countries: S&D erosion**

The proposal, in paragraphs 7 to 9, makes the following analysis:

7. The concept of S&D underwent a dramatic transformation in the Uruguay Round Agreements. The S&D treatment prior to WTO was in recognition of the special problems of development faced by developing countries, but in the WTO agreements it only recognized the special problems that developing countries may face in the implementation of the agreements. This major shift in the focus from the problems of development to the problems of implementation meant that:
  - (i) It was assumed that the level of development had no relationship with the level of rights and obligations under the multilateral trading system,
  - (ii) The same policies could be applicable for countries at various levels of development. It was thought that all what was required was the grant of short transition periods and technical assistance for the developing countries; and
  - (iii) Developing countries did not have the option to sign or otherwise on the various agreements because all of them, excepting four plurilateral agreements, were part of the Single Undertaking.
8. This dramatic erosion of S&D treatment was further compounded by the fact that the WTO agreements went far beyond the traditional border measures covered under the GATT and included many more areas of domestic economic policy making. In addition, these agreements were enforceable through a binding dispute settlement mechanism under the WTO.
9. The Uruguay Round Agreements shifted the thrust from enhanced market opportunities to grant of transition periods and technical assistance. The developing countries could hardly benefit from the almost 145 S&D provisions (in the Uruguay Round Agreements) which mostly do not go beyond a best endeavour promise and therefore are not legally enforceable. Lack of any mechanism to ensure effective implementation of S&D provisions in the WTO has been a major area of concern for developing countries.

**4.1.2 Elements of an S&D agreement**

The proposal then, in its paragraph 15, went on to sketch some elements of such a framework agreements as follows:

- Special and Differential treatment shall be mandatory and legally binding through the dispute settlement system of the WTO (including notification requirements and inclusion of these commitments in country schedules).
- In any future agreement, that the Members may negotiate or agree to, there shall be an evaluation of the development dimension. This evaluation should include the fact as to how these agreements facilitate attainment of developmental targets (e.g. as set out in the Millennium Declaration).

- The Members shall undertake an evaluation of the implications of any future agreement, with respect to implementation costs in terms of financial, capacity building and technical assistance, etc.
- The transition periods shall be linked to objective economic (debt level, level of industrial development, human development index, etc.) and social (literacy and life expectancy) criteria.
- Without an evaluation of the fact whether an Industrial Policy has a demonstrable adverse impact on trade, there shall be no prohibition of policies that promote growth and development in developing countries.
- The application of the concept of "Single Undertaking" for developing countries should not be automatic.

The importance of this proposal cannot be overestimated. It was specifically noted by the Ministers in paragraph 44 of the Declaration of the 4<sup>th</sup> Session of the Ministerial Conference, and may be considered one of the important factors that contributed towards the ministerial agreement to review and strengthen all S&D provisions in the WTO Agreement.

However, the proposal was quite sketchy. A priority now must be to elaborate the ideas it set out in some detail and present these to the Special Session of the CTD as well as other committees where S&D issues are considered. In this regard, the Africa Group proposal may provide a model and considerable input, for it already develops some of the ideas.

## **4.2 Proposals by the Africa Group and the Like Minded Group**

### **4.2.1 *No legal implications***

In the background notes<sup>23</sup>, the secretariat indicated that there would be no legal implications for making S&D provisions mandatory, where the provisions could in effect be considered as binding obligations. In particular, the use of "should" or the non-use of "shall" in itself does not mean that the provision is not obligatory or mandatory.

### **4.2.2 *The Issue of Spanish "shoulds" and English "shalls"***

One issue quite regularly arising in WTO meetings, is that in Spanish "should" translates into a mandatory obligation equivalent to the sense conveyed by the English "shall". This in part accounted for the Spanish-speakers' satisfaction with the language of Paragraph 4 of the *Declaration on Public Health* and the *TRIPs Agreement*. It may be an argument for not being terribly psychotic against the conversion of "shoulds" to "shalls" in order to have the same legal effect in English as in Spanish.

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<sup>23</sup> WTO document WT/COMTD/W/77/Rev.1/Add.3, paragraph 7. It may be noted that the secretariat stated this position in quite guarded terms, reflected throughout the analysis of the various non-mandatory provisions in the document.

### **Conversion methods**

There could be two ways of removing the best endeavour language, that is, “the shoulds”.

- (a) An exercise of deleting the shoulds and replacing them with shalls, can be undertaken provision by provision, perhaps in some instances adding consequential clauses to complete the obligation. This is the approach the proposals of the Like Minded Group<sup>24</sup> and of Thailand<sup>25</sup> take. The proposals taking this approach, however, cover only a few agreements and do not extend to the full array of all S&D provisions.<sup>26</sup> This would undoubtedly be an extensive exercise.
- (b) The Africa Group suggestion, as a variation of the approach of the Like Minded Group, is to schedule the provisions to be made mandatory, and then in one provision of a General Council Decision state that they are made mandatory. The effect of this would be that, when interpreting and applying those provisions, it would be understood that they are mandatory. But as a purely administrative exercise, the provisions could subsequently be re-drafted as a legal revision exercise on the basis of precise instructions; for instance, deleting the “mays” and the “shoulds” where they occur in specifically scheduled provisions, and replacing them with “shalls” or otherwise producing the mandatory language.
- (c) Under the second or alternative approach, where the provisions are in effect mandatory, but may be unclear, the General Council could adopt an authoritative interpretation going provision by provision, putting clear and specific meaning to the provisions. Similarly, where they are not mandatory, they could be strengthened or clarified through interpretation. The authoritative interpretation becomes part of the provision, and the provision is interpreted and applied on light of the interpretation adopted by the General Council. Part III of the Africa Group proposal, is based on this second approach and contains paragraphs 34 to 90 suggesting interpretations for the various S&D provisions of the *WTO Agreement*. St Lucia made an important proposal on Article XVIII of GATT 1994<sup>27</sup>, suggesting interpretations that would facilitate

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<sup>24</sup> WTO documents TN/CTD/W/1 and 2. These proposals suggest the deletion of “may” from Article 27.1 of the Subsidies Agreement (W1); the deletion of expressions like “whether” and “consider”; and the rendition of the provisions with “shall” in the Agreements covered (please note 28 below). Regarding the Agreements on SPS (Article 9.2) and TBT (Article 12.3), the proposal (W2) suggests the addition of a clause requiring the provision of “technology and technical facilities on preferential and non-commercial terms, preferably free of cost”. On Article 10.1 of the SPS Agreement, the proposal suggests a new clause requiring consultations.

<sup>25</sup> WTO document TN/CTD/W/7 dated 20 June 2002. This proposal suggests that, in Article 3.5(a)(iv) of the Agreement on Import Licensing, “would” be replaced with “shall”.

<sup>26</sup> These proposals cover the Subsidies Agreement, Dispute Settlement Understanding, Sanitary and Phytosanitary Measures Agreement, Technical Barriers to Trade Agreement, and Import Licensing Agreement. These are only 5 out of the 17 substantive Agreements and the 29 decisions and declarations listed by Ambassador Ransford Smith of Jamaica as Chairman of the Special Session of the CTD in his communication to delegations dated 15 April 2002. Arguably, many decisions and declarations may not be terribly relevant in the exercise of the review of S&D provisions, but several are, such as the Decision on Measures in Favour of Least Developed Countries.

<sup>27</sup> TN/CTD/W/8. However, it will be important not to argue the St Lucia proposal as an alternative to the GATT Article 19 provisions and to the Agreement regulating resort to safeguard measures. Rather, the proposal should be understood as suggesting a mere streamlining of the procedures for using Article XVIII, and justifiably so given the recent debate on implementation issues and the institutional changes introduced by the WTO

recourse to the provisions, in the context of addressing the needs of small vulnerable economies. (See Box 4)

#### Box 4

##### St Lucia Proposal towards enhancing the effectiveness of Article XVIII

The ST Lucia proposal concludes as follows:

8. The following proposals are advanced as a means towards enhancing the effectiveness of Article XVIII: Section C of GATT 1994 as a trade policy instrument which would address, *inter alia*, the needs of small and vulnerable developing country Members:
  - a) Basic guidelines setting out the procedures for recourse to Article XVIII: Section C should be elaborated. The guidelines would assist in clarifying certain procedural ambiguities in the text.
  - b) The condition limiting Article XVIII: Section C to circumstances involving "infant industries" should be interpreted broadly to facilitate the implementation of sustainable economic development programmes in small and vulnerable developing country Members, including circumstances where established industries are threatened by an absolute or relative increase in imports. Additionally, there should be clear reaffirmation that the duration and review of the measure must be tied to achievement of the objectives for which the measure was imposed as opposed to any arbitrary absolute number of years.
  - c) The right to compensation and/or retaliation should be waived for an initial period of application given the limited ability of small and vulnerable developing country Members to provide compensatory concessions and the limited impact that restrictions would have on global trade. It is worth noting that there is a lack of symmetry regarding the application of trade remedies. Generally, the unilateral response of a larger nation against a smaller nation carries markedly more impact than the reverse.
  - d) Article XVIII: Section C should be affirmed as a new distinct special and differential (S&D) trade policy instrument for, *inter alia*, small and vulnerable developing country Members with limited administrative capacities; and not merely a measure of last recourse. Small and vulnerable developing country Members require effective trade policy instruments – considered vital for successful liberalization – to promote sustainable economic growth and development.

#### 4.2.3 The mandate to change S&D provisions

The Africa Group has proposed that all S&D provisions that for the moment are not mandatory should be immediately and unconditionally made mandatory<sup>28</sup> unless it was legally and practically impossible if demonstrated. The Group suggested this approach on the basis that the mandate for making the provisions mandatory already existed in paragraph 44 of the Ministerial Declaration.<sup>29</sup> Consequently, it would only be up to the delegations opposed to the conversion to show how it was legally and practically impossible, for each S&D provision they wished to be left non-mandatory.

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Agreement as well as the mandate to review all S&D provisions.

<sup>28</sup> Paragraphs 29 and 30 of WTO document TN/CTD/W/3/Rev.1

<sup>29</sup> Paragraph 7 to 12 of the WTO document TN/CTD/W/3/Rev.1

#### **4.2.4 *Convenient financial implications and the balance of concessions***

In the discussion in the special sessions of the CTD<sup>30</sup>, some developed countries pointed out that there would be financial implications for making the provisions on technical assistance mandatory. They indicated that they would be reluctant to commit themselves to financial obligations towards developing countries in the context of the review. They stated that the best endeavour language was the most suitable, as it left them the flexibility that enabled them to agree to the provisions as they existed.

This is the gist of the matter; this reluctance of developed countries is very much to be regretted. One may wonder whether Ministers envisaged the qualification that any S&D provisions with financial implications would not be made mandatory. If developed countries do not wish to undertake financial commitments to developing countries, this fact should have been and should henceforth be clearly indicated in any negotiations on or consideration of technical and financial assistance provisions, so that the provisions are not held out as tangible benefits for developing countries that they should consider to have gained in exchange for their concessions to developed countries.

#### **4.2.5 *Financial arrangements for S&D***

In this regard, the Africa Group suggested that a fund on S&D could be established as a standing facility within the Doha Development Agenda Global Trust Fund, through which Members could meet their S&D financial obligations. The Group further suggested the precise quantification of financial implications of transition and adjustment periods in implementing WTO obligations, which would assist in defining the financial obligations entailed. In this manner, obligations would only be finalised when they are realistic and feasible. This should be preferred to the bluffs that promises for technical and financial assistance have turned out to be, to the prejudice of developing countries and of the integrity of the WTO as an institution. These suggestions of the Africa Group should sufficiently deal with any developed-country concerns about “open-ended funding”, and they merely reflect the expectation in agreeing the technical and financial assistance provisions, that resources will be available to enable the implementation of the new obligations and the establishment of the necessary institutions, and to service the adjustment process.

#### **4.2.6 *Financial implications for developing countries***

An additional appropriate response to the developed country concerns over the financial implications for converting the technical and financial assistance provisions into mandatory obligations, should be for developing countries to point out the enormous financial and economic implications of the requirements imposed by developed countries on developing country exports. The 16-17 May 2002 UNCTAD Seminar on Standards and Trade, produced

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<sup>30</sup> At the 16 May 2002 meeting of the special session, scheduled to discuss the first batch of Agreements, the specific proposals by the Like Minded Group on the SPS Agreement met the rather obstructive response from the QUAD countries that making the provisions mandatory would have unacceptable financial implications in requiring “open-ended funding”. But before beginning to repetitively advance this view, the QUAD countries had taken up much valuable time objecting to the use of the “TN/CTD” symbol on the proposals and documents before the special session. They objected to the implication that the special session was in negotiating mode. The secretariat explained that the TN symbol was used solely because it was the Trade Negotiations Committee that established the Special Session of the CTD.

papers on experiences from various developing countries on the financial and development implications for them resulting from health-standard requirements maintained in some developed countries against their exports.<sup>31</sup> Some of the findings included the following:

- The health standards were restrictive to developing country exports.
- Developing countries were not in a position to readily comply with the requirements due to resource constraints.
- The measures were standing requirements and were regularly invoked.
- As a result the developing countries were suffering heavy losses in export income and industries were closing down. For instance, Uganda, a least developed country, suffered a loss of USD 36.9 million over a period that the EU imposed bans on its fish export, the fishing community suffering losses estimated at USD 1 million per month. Out of 11 factories, 3 closed and the rest operated at a capacity of only 20 per cent. This scale of adverse effects is monumental for small economies.
- The financial and technical resources for complying with the requirements were high and beyond the resources of many developing countries. In her statement to the special session of the CTD on 14 June 2002, the delegate of Sri Lanka<sup>32</sup> pointed out the enormous financial resources required for the country to train employees and modernise equipment in order to meet the health requirements on its spice exports. Research and development required USD 8 million per annum, of which the government could provide only 3 per cent. The cost of training employees was estimated at USD 1.954, but local resources could meet only 3 per cent of this. Non-compliance with health standards was costing the county 2,400 jobs per year, about 4 per cent of the labour force in the sector.

It would be important for developing countries to ensure that results or reports of seminars and workshops that are directly relevant are formally presented to the WTO and circulated as WTO documents. Individual delegations may consider taking the initiatives in this regard. Such results and reports would have important empirical findings to support and argue their positions.

#### **4.2.7 Interpretations as speedy alternatives**

When the Africa Group discussed in one of its preparatory meetings, the issue of whether the CTD should recommend that the General Council adopt certain interpretations on the various S&D provisions, delegations felt that an authoritative interpretation, through a process of elaborating the meaning and application of each of the provisions, could also achieve the result of making the provisions stronger, more precise, effective and operational. This alternative was considered in view of the procedural difficulties with amendments. Amendments require certain majorities in order to enter force, and when they enter force they bind only Members that accept them.<sup>33</sup> The risk in this procedure is that certain amendments may not bind certain Members, and this would fragment the multilateral trading system. On the other hand, interpretations would immediately bind all Members, and would not involve additional procedures to enter force.

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<sup>31</sup> [www.unctad.org/trade\\_env](http://www.unctad.org/trade_env)

<sup>32</sup> Mrs Gothami Indikadahena.

<sup>33</sup> Article 10(3) of the WTO Agreement.

Consequently, the Africa Group proposal contains about 57 recommendations in its part III, on practically all S&D provisions in the WTO Agreement, on the meaning and application of the provisions. This should not be considered as violating the requirement<sup>34</sup> that authoritative interpretation should not be used in a manner that undermines the provisions on how amendments to the WTO Agreement should be done. The recommended interpretations to put to the various provisions only fulfil the mandate already given to the CTD to be completed in the short time frame that was prescribed, the Ministers having clearly agreed, by consensus, that the existing S&D provisions are an integral part of the WTO Agreement and that the provisions should be strengthened, made more precise, effective and operational.

#### **4.2.8 Formalisation of obligatory S&D provisions**

Therefore, according to the Africa Group, the conversion of S&D provisions into mandatory provisions remains a matter of formalising the existing position<sup>35</sup>:

“8. In this exercise, it is well to bear in mind that these special and differential treatment provisions were already negotiated in the adoption of existing agreements. They were included as part of the settlements negotiated and arrived at, with the clear understanding that the balance they aimed to achieve was necessary and constituted benefits for developing and least-developed countries within the meaning of the WTO Agreement. This entitled developing and least-developed countries to legitimate expectations that these obligations relating to special and differential treatment would be faithfully implemented and complied with. Impeding the attainment of these benefits relating to special and differential treatment is an issue for the WTO as an institution to resolve and to do so efficaciously.”

It should not be forgotten that the Ministers, in paragraph 44 of the Declaration, already noted the concern over the ineffectiveness of the S&D provisions to address the concerns of developing countries and agreed to review all S&D provisions to make them stronger, more precise, effective and operational. There is agreement therefore to convert the provisions, by re-writing or re-phrasing them, or by an interpretation, as pointed out in paragraph 12 of the Africa Group proposal.

#### **4.2.9 Further work on incorporation into the architecture of WTO rules**

The issue that could entail “some careful thought”, in the words used in the work programme of the Special Session of the CTD<sup>36</sup>, is the incorporation of S&D into the architecture of WTO rules. This issue is not necessarily limited to the short deadline there was of July 2002, though there was no prohibition on accomplishing it by then. Further, the mandate on the issue was taken away from the CTD. Rather, this specific issue, of the architecture of WTO rules, should be considered as gap filling when the precise tasks have been completed, and as on-going work, to further strengthen S&D provisions (for instance through preparing a specific WTO Agreement on S&D, or an Agreement on Development Provisions of the WTO, which could be taken up in the context of the entire work programme or negotiations); because S&D provisions are already an integral part of the WTO Agreement, and therefore already an integral part of the architecture of WTO rules.

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<sup>34</sup> The last sentence of Article 9(2) of the WTO Agreement.

<sup>35</sup> Paragraph 8 of WTO document TN/CTD/W/3/Rev.1

<sup>36</sup> Paragraph 3 of WTO document WT/COMTD/36

## 5. THE QUESTION OF GRADUATION

### 5.1 Graduation

Some developed countries have argued that S&D should not apply to the advanced developing countries, on the basis that S&D should be “objectively” determined. It is instructive that the pre-Doha proposal for a framework agreement on S&D, stated that<sup>37</sup>

“The transition periods shall be linked to objective economic (debt level, level of industrial development, human development index, etc.) and social (literacy and life expectancy) criteria.”

However, it should not be forgotten that the very next tiret in the paragraph stated that

“Without an evaluation of the fact whether an Industrial Policy has a demonstrable adverse impact on trade, there shall be no prohibition of policies, which promote growth and development in developing countries.”

Reference has been made also, in a rather convenient manner by both the developed countries and the advanced developing countries, to the reference to “objective criteria” in the Africa Group proposal; the developed countries to seek support for graduation and the advanced developing countries to express reservations. The Africa Group proposal, however, in paragraphs 23 and 24, suggests that transition periods should first and foremost be designed to fully serve their purpose as adjustment periods, and that they should be available as and when necessary. The proposal states as follows in material parts:

“23. Transition periods shall be designed to provide developing and least-developed country Members with a period of time that is adequate,

- (a) To carry out institutional changes and adjustments that may be necessary for them to address their supply side and other resource constraints;
- (b) To attain a level of socio-economic development commensurate with obligations under and that enables them to beneficially and equitably participate in the agreements; and
- (c) To attain socio-economic growth and development rates that will sustainably ensure continuous improvement in living conditions.

24. Accordingly,

- (a) Transition periods shall not be arbitrarily set or inadequate. They shall be based on objective criteria, and a preponderance of studies acceptable to all Members that show undoubted projections and conclusions, that demonstrate under a clear schedule of progress the attainment of the required capacity and of socio-economic development levels for purposes of the agreements; and
- (b) Developing and least-developed country Members shall always have a right to extend transition periods provided that they shall notify the World Trade Organisation and when requested commence consultations in the relevant councils and committees.”

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<sup>37</sup> Paragraph 15 of WTO document WT/GC/W/442 dated 19 September 2001

Graduation should not mean the abolition of S&D for advanced developing countries. Just like the developed countries obtained the equivalent of S&D for their adjustments under the WTO Agreements on Textiles, and on Agriculture, any other country particularly developing countries could need special treatment in terms of safeguards and limitations on commitments to be made.

S&D should concern not just the quantitative GDP per capita as a development index, but the maturity of the economy and the sustainability of development. The recurrent financial crises in advanced developing countries, show the importance of maintaining some scope for S&D for these countries. As pointed out in the pre-Doha proposal by a group of developing countries, the objective criteria should include, debt level, level of industrial development, human development index, literacy, and life expectancy. The debate on small economies should also be had in mind, and their vulnerability should be considered though they may have GDP per capita far exceeding that of most developing countries. Such criteria could be applied to the entire question of whether a country needs S&D. And on such criteria, practically all developing countries will still need S&D.

Both the World Bank and the UNDP, have adopted country classification and evaluation systems that should assist in determining the utility or otherwise of specific elements of S&D. In the WTO, the practice of according more preferential treatment to least developed countries, and small developing countries with GDP per capita below certain figures (USD 1000 for Annex VII of the *Subsidies Agreement*), could be a basis for supporting a system of S&D that objectively reflects the needs of developing countries.

This system of classification and evaluation would operate in future and on-going negotiations. In such future negotiations, transition periods would reflect the projected length of adjustment required for countries in given socio-economic categories; or for instance, adjustment periods required by low-income countries. Flexibility in development policy, including the use of subsidies and other support, would be agreed on the basis of the level of industrial development, literacy levels, life expectancy, the availability and extent of depressed regions as well as marginalized people, and rural poverty. Some of these criteria are already covered by the Subsidies Agreement, but under stringent conditions. The criteria needs to be extended across all the WTO Agreements, and not limited to the Subsidies Agreement. And the criteria must be flexible to enable ready utilisation.

Regarding the existing S&D provisions that are not covered by the negotiating mandates in the Ministerial Declaration, as well as those classified as implementation issues, they should be complied with immediately and unconditionally as strengthened and made more precise, effective and operational by the CTD and the General Council in accordance with paragraph 44 of the Declaration of the 4<sup>th</sup> Session of the Ministerial Conference.

## **5.2 The Application of Annex VII criteria to all Agreements**

This is not to suggest that there should be a re-classification of least developed countries. What may be done is to introduce a category of small developing countries that should be entitled to more preferential treatment in certain circumstances than the advanced developing

countries. Annex VII of the *Subsidies Agreement* could be extended across all WTO Agreements, without adding new countries except in accordance with paragraph 10.4 of the *Decision on Implementation Issues and Related Concerns*.<sup>38</sup>

In addition, social justice, or programmes to address depressed areas or marginalized sections of society should always be fully and explicitly provided for as a matter of important public policy, which may need special treatment in developing countries in terms of additional flexibility compared to that available to developed countries.

### 5.3 The Enabling Clause

The Enabling Clause provides that developing countries would take on obligations commensurate with their level of development and resources. The Clause further provides that more preferential treatment may be accorded to the least developed countries. The General Council granted a waiver to last until 30 June 2009, under the Enabling Clause, to permit developing countries to grant preferential market access for products from least developed countries.<sup>39</sup>

Graduation may mean, however, that a country should not be expected to accord preferential market access to a developing country that has a higher GDP per capita than itself. For instance, Hungary maintains a GSP scheme for developing countries. The scheme excludes developing countries that have a higher GDP per capita than Hungary's, and reasonably so one could add.<sup>40</sup> The delegation of Paraguay has taken the position that waivers granted under the Enabling Clause should not discriminate among developing countries. In response to questions from Hungary<sup>41</sup>, specifically whether waivers that do not cover all developing countries should be prohibited, Paraguay clarified that it did not envisage an obligation on countries to provide preferential access to developing countries with higher GDP per capita and that compensation should be given to developing countries that are excluded from waivers if they consider themselves negatively affected.<sup>42</sup>

In any consideration of graduation, the right to obtain waivers in accordance with Article 9 of the *WTO Agreement* must not be compromised. Waivers have the legal effect of doing away with any relevant WTO obligations. Therefore, under a waiver preferential market access can be granted to a country or a group of countries, waiving the non-discrimination obligations. Such waivers will always be granted subject to certain terms and conditions, which may include addressing concerns other countries may have other than prohibiting the waivers.

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<sup>38</sup> Developing countries whose GDP per capita falls below USD 1000 may be included in Annex VII of the Subsidies Agreement.

<sup>39</sup> Please see WTO document WT/COMTD/W/77/Rev.1/Add.4 on Utilisation of Special and Differential Treatment Provisions, the part dealing with the Enabling Clause.

<sup>40</sup> Paragraph 3 of WTO document TN/CTD/W/10

<sup>41</sup> WTO document TN/CTD/W/10

<sup>42</sup> Paragraphs 6 to 13 of WTO document TN/CTD/W/5/Add.2

#### **5.4 Extraneous criteria in GSP schemes should be prohibited**

The submission of Paraguay should be treated as helpful in certain respects. It raises a fundamental question, that some developed countries have used GSP schemes to pursue political rather than trade goals, or the objective of imposing their standards in the areas of environment, labour and intellectual property protection, among others.<sup>43</sup> In this sense, GSP schemes have primarily benefited and been designed on the basis of the interests of developed countries. This issue should be squarely addressed, not by prohibiting or undermining GSP schemes, but agreeing that extraneous criteria such as those mentioned or illustrated in the Paraguay proposal, should be explicitly prohibited. GSP schemes should be designed and adopted solely in accordance with the objective of promoting developing country exports to developed countries, in accordance with the Enabling Clause, and with the intention or spirit of Part IV of GATT 1994 (and the expired 1971 *GSP Decision*).

#### **5.5 History of paragraph 1 of the Enabling Clause**

The GSP schemes have a history that makes them a special category of waivers governed by paragraph 1 of the Enabling Clause, and to be operated on a non-discriminatory basis. Part IV of GATT 1947, added in 1964-65, was a special initiative (but not the exclusive one) to address the need for enhanced market access for developing country products, in the specific context of initiatives from developed countries and non-reciprocity on the part of developing countries. The temporary (10-year duration) GSP Decision of 1971 was a rather belated effort to operationalise Part IV and to address the controversy arising. It meant to clarify that developed countries could adopt generalised systems of preferences for developing countries and that this was not to be prohibited by the non-discrimination obligations of Article I of GATT. Given that the Decision was to expire in 1980, the GATT Members agreed upon paragraph 1 of the Enabling Clause in 1979 during the Tokyo Round negotiations, in order to put the 1971 GSP Decision on a permanent footing.

#### **5.6 Legal effect of paragraph 1 of the Enabling Clause**

Paragraph 1 of the Enabling Clause is not meant to be the sole regime on all waivers under GATT 1947, let alone the WTO. Waivers may be sought outside the Enabling Clause. The practical operation of paragraph 1 of the Enabling Clause, is that generalised waivers should be permitted and should not be considered to breach the MFN obligation. Its legal effect, is to permit such waivers, rather than to require that all waivers comply with its conditions. To take the view that the legal effect of paragraph 1 of the Enabling Clause is to require that all waivers comply with its conditions, would not make sense in the context of the other WTO rules on waivers.

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<sup>43</sup> Paragraph 10 of WTO document TN/CTD/W/5

## 5.7 Other rules on waivers

When Part IV was introduced in 1964-65, it did not have the effect and was not intended to abolish the waiver provisions of Article 25 of GATT 1947. The waiver provisions of Article 25 continued to operate. Indeed, footnote 2 in paragraph 2 of the Enabling Clause (adopted in 1979), envisaged the continued use of Article 25 for co-operation arrangements involving developing and developed countries. The United States cited footnote 2 as the basis for its development arrangements with the Caribbean<sup>44</sup> and Andean<sup>45</sup> countries. Similarly, when the WTO Agreement was negotiated, Article 9 was included. GATT 1994 specifically contains an Understanding on Waiver of GATT Obligations. The Understanding provides for conditions on seeking waivers and for the application of Article 9 of the WTO Agreement as well as the Dispute Settlement Understanding where waivers nullify or impair the benefits of a non-covered country. It is thus envisaged that waivers may exclude some developing countries in certain circumstances, and these other countries are provided with safeguards and remedies.

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<sup>44</sup> GATT Basic Instruments and Selected Documents (BISD), the Thirty First Supplement at p. 180, cited as 31S/180.

<sup>45</sup> BISD 39S/384, 40S/186.

## **6. CAPACITY BUILDING IN GENERAL**

Capacity building has come to be considered as the panacea for all concerns over the imbalanced nature of the WTO. Yet the manner capacity building activities are formulated and undertaken clearly shows that the real problems are not addressed. Further, before the Doha Ministerial Conference (before the adoption of the “Doha Development Agenda”), and to some extent still, the WTO has been to assert that it is not a development institution and therefore must not be expected to give development assistance.

### **6.1 Meaning of capacity**

Capacity may be understood to have several aspects: capacity to negotiate in specific instances of negotiations or generally to effectively participate in the ongoing processes at the WTO particularly to prepare for and attend meetings and effectively promote and defend positions; capacity to implement and to comply with obligations; capacity to identify and enforce rights; capacity for domestic industries to compete in the multilateral trading system; and capacity for public institutions to protect and promote the public interest in sectors covered by the WTO Agreement.

### **6.2 Workshops are inadequate**

The WTO capacity building activities mainly take the form of workshops and seminars, and technical missions. The annual programmes compiled by the Development Division of the WTO, will bear this out. The number of and the enormous expenses on these workshops and missions, are then held out as proof that a lot of capacity building has taken place.

It will be noticed that workshops and seminars, and technical missions, do not at all adequately cover the multi-faceted nature of capacity building. Capacity building should address the supply side constraints of developing countries, and build domestic skills in all WTO sectors. To be effective, capacity building needs a wholesome rather than a piecemeal approach.

### **6.3 The need for a coherent approach to technical assistance and training**

The Africa Group proposal suggests a coherent approach to technical assistance and training.<sup>46</sup> In paragraphs 19 and 20, the proposal states that

“19. Special and differential treatment shall aim, to address and resolve the imbalances between developed country Members and developing and least developed country Members, to ensure equity in the totality of obligations and rights, to support developing and least developed country Members to undertake adjustments that are necessary for them to meaningfully benefit from the agreements, to effectively ensure

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<sup>46</sup> Paragraphs 19 and 20 and Annexes I and II of WTO document TN/CTD/W/3/Rev.1

the success of export and production diversification programmes of developing and least developed country Members, and to secure for them market access in the multilateral trading system that will facilitate their rapid economic development.

20. Assistance to developing and least developed country Members shall be coherent with their broad development needs. In this regard, it shall be part of and fit within the comprehensive solutions and programmes adopted by those Members; and it shall not be piecemeal, isolated nor inconsistent with their long term programmes and needs. Assistance shall provide short and long-term solutions to the problems faced by developing and least developed Members to implement and comply with their obligations and exercise their rights.”

In Annexes I and II, the proposal develops some detailed and practical suggestions. For instance, regarding training, the proposal states that<sup>47</sup>

“3. Seminars shall normally be situated or localised in the territories of Members and regions, in addition to those that are given at the WTO secretariat. When situated in territories of Members and regions, they shall be directly linked into the curricula of institutions of high learning particularly at university level. Some seminars should be given as part of the courses at these institutions of learning. University teaching staff should be involved as trainers on seminars given to government officials and civil society. And the seminars should be scheduled within or make part of the long-term capacity building programmes within the country or region.”

#### **6.4 The Mandatory requirements for a coherent approach**

In the discussion in the Special Session of the CTD, delegations supported these suggestions. The CTD report to the General Council, in this regard, recommended that that these suggestions be considered for immediate use in the formulation of the Technical Assistance Programmes, including the 2003 programme. However, this is no solution if a coherent approach to technical assistance and training is not made an integral part of the WTO rules on technical assistance, and converted in mandatory requirements in the formulation and implementation of technical assistance programmes.

#### **6.5 IF and JITAP as illustrations**

The Integrated Framework (IF) and the Joint Integrated Technical Assistance Programme (JITAP) are a better approach to capacity building. They are country-based programmes, and may directly deal with specific problems in the country. However, the programmes have faced resource shortfalls<sup>48</sup>, and covered only very few pilot countries. They are therefore not an answer to the need for full capacity building in all developing countries; but they suggest that unless such programmes can cover all developing countries (except perhaps the advanced developing countries), it should be accepted that capacity building would remain inadequate.

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<sup>47</sup> Paragraph 3 of Annex II on Training Programmes

<sup>48</sup> While the G8 was spending USD 800 million at their short Okinawa summit, only USD 20 million was being committed to the IF budget.

## 7. MONITORING MECHANISM FOR S&D PROVISIONS

A monitoring mechanism for S&D could have three joint and reinforcing elements, namely:

- The holding of special annual sessions of the General Council or scheduling dedicated agenda items at the biennial sessions of the Ministerial Conference;
- The establishment of a Sub-committee on S&D as a subsidiary organ working under and reporting to the CTD; and
- A requirement that all WTO committees keep S&D as a standing agenda item for all their meetings, and that they produce regular reports on S&D.

### 7.1 Special Annual Sessions of the General Council

The Consultative Group of Least Developed Countries proposed that the General Council should be holding annual special sessions to review S&D provisions, as a way of operationalising the *Decision on Measures in Favour of Least Developed Countries*, and the other S&D provisions.<sup>49</sup> The agenda of the special sessions, according to the proposal, would comprehensively address S&D provisions in favour of least developed countries, under three main headings, namely: the implementation of the *Decision on Measures in Favour of Least Developed Countries*, review of the implementation of specific S&D provisions in all WTO instruments including decisions and declarations, and overall review of S&D.

In the discussion of this proposal, as pointed out in the CTD's report<sup>50</sup>, some delegations felt that if a monitoring mechanism on S&D is established as proposed by the Africa Group, the proposed agenda items for the special sessions of the General Council would be addressed under the mechanism but without diluting the specificity of the interests and concerns of least developed countries.

While the monitoring mechanism is appropriate and should be immediately put in place, this is not at all inconsistent with special annual sessions of the General Council dedicated to S&D. The continuous review, at the highest level in the WTO architecture of organs, of S&D

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<sup>49</sup> Paragraphs 22 to 24 of WTO document TN/CTD/W/4

<sup>50</sup> Paragraph 8 of WTO document TN/CTD/3:

“8. The proposal for an Annual Special Session of the General Council on the participation of the LDCs in the multilateral trading system was made by the LDCs Group. They proposed that the agenda of such an annual session could encompass (i) the implementation of the Decision on Measures in Favour of Least-Developed Countries and its overall objectives in favour of LDCs; (ii) the review of the implementation of the specific special and differential provisions included in the WTO Agreements, Decisions and declarations; and (iii) overall review of special and differential treatment. Some Members were of the view that should a monitoring mechanism be established its role and functions could encompass those sought through the proposed holding of an annual special session, although it was emphasized that this would have to be without dilution of the concerns of the LDCs. Others suggested that the various proposals and their role and functions would need to be assessed in the context of existing machinery such as the Sub-Committee on the Least-Developed Countries and the Integrated Framework.”

provisions particularly in relation to least developed countries, is a standing obligation at the core of the WTO as an institution.

The *Marrakech Declaration* of 15 April 1994 states that the Ministers:

“... agree to keep under regular review by the Ministerial Conference and the appropriate organs of the WTO the impact of the results of the (Uruguay) Round on the least-developed countries as well as on the net food-importing developing countries, with a view to fostering positive measures to enable them to achieve their development objectives ...<sup>51</sup>”

Further, the *Final Act Embodying the Results of the Uruguay Round* states that the results of the negotiations, forming an integral part of the *Final Act*, are the *WTO Agreement*, the Ministerial Declarations and decisions, and the *Understanding on Commitments in Financial Services*.<sup>52</sup> The *Decision on Measures in Favour of Least Developed Countries*, is such a ministerial decision. In turn that decision states that:

“The Ministers agree that the expeditious implementation of all special and differential measures taken in favour of least-developed countries including those taken within the context of the Uruguay Round shall be ensured through, inter alia, regular reviews<sup>53</sup>; and

The Ministers agree to keep under review the specific needs of the least developed countries and to continue to seek the adoption of positive measures which facilitate the expansion of trading opportunities in favour of these countries<sup>54</sup>.”

When the Ministers adopted such decisions, they were fully cognisant of the undesirability of unnecessary duplication of meetings and issues. In any case, concerns over duplication should be raised, if at all, on the basis that the issues are adequately covered by one committee or that they are not important in the overall ranking of issues for the WTO agenda. If development is to be at the core of the WTO as an institution<sup>55</sup>, S&D is the face of development that should be seen and heard at all WTO meetings and in all the processes. A high political and technical profile for S&D, are both equally important aspects that need not be chosen between; rather they should be seen as complementary.

## 7.2 The Need for a Sub-committee on Special and Differential Treatment

The proposal by the Africa Group suggested the establishment of a monitoring mechanism for S&D. So far, other delegations have expressed support for such a sub-committee. There should be sufficient goodwill to formally establish the mechanism but as is to be expected the real test of its effectiveness will be in its actual operation.

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<sup>51</sup> Paragraph 5

<sup>52</sup> Paragraph 1

<sup>53</sup> Paragraph 2(i)

<sup>54</sup> Paragraph 3

<sup>55</sup> Paragraph 2 of the Declaration of the 4<sup>th</sup> Session of the Ministerial Conference, WTO document WT/MIN(01)/DEC/1

### **7.2.1 *Enough of clarifications***

The functioning and structure of the monitoring mechanism needs to be clearly sorted out. In the discussion in the special sessions of the CTD, the keen interest of delegations in the proposal for a monitoring mechanism raised various questions, which received clarifications from the Africa Group. But this tended to portray the impression that there were details to be worked out, and led to the view that further work on the functioning and structure needed to be done. The monitoring mechanism will continue to be one of the issues for consideration during the extended period that is until December 2002, for the completion of the review of S&D provisions.

The further work, from the perspective of delegations that proposed, clarified or supported the mechanism, should be in terms of re-iterating their positions and explanations, while remaining receptive to new suggestions, if any, from delegations that forced the issue into further work.

### **7.2.2 *The rationale for a monitoring mechanism***

The case for a monitoring mechanism may be stated as follows.

- (a) Where S&D provisions are mandatory in nature, and impose obligations on Members, they still largely remain un-operationalised. There are S&D provisions that are already mandatory<sup>56</sup>, and after the review it is envisaged that all S&D provisions will be mandatory or there will be additional mandatory S&D provisions.
  - (i) Mandatoriness in itself has not been sufficient to ensure that the provisions are implemented and complied with by Members and the secretariat. This means that the exercise of converting S&D provisions into mandatory provisions, while important, should not be considered as the entire solution to the ineffectiveness of S&D provisions. It is important that the provisions have a mechanism that monitors their operation and addresses any difficulties to ensure that they are utilised and practically beneficial to developing countries.
  - (ii) The various committees should be under an obligation to prepare reports on the implementation and utilisation of the S&D provisions in the relevant Agreements. The reports could be prepared twice a year, to maintain a degree of quick continuity and ease of follow up. In itself, this requirement, as an aspect of the monitoring mechanism, would assist to keep S&D provisions high on the agenda of the various committees. Copies of the reports would be sent to a sub-committee of the CTD to be established specifically for monitoring S&D provisions. The sub-committee, working under the authority of the CTD, would act as a focal point for all S&D provisions in the various Agreements.
- (b) S&D provisions have remained largely unimplemented in on-going WTO processes. Despite existing provisions, in the real practice on the ground in WTO committees and on-going work programmes, S&D provisions have been mere anecdotes or in effect

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<sup>56</sup> WTO document WT/COMTD/W/77/Rev.1/Add.1/Corr.1

“any other business”, rather than the basis for designing or formulating and conducting WTO business.

- (i) This applies, for instance, in the scheduling of meetings, selection and prioritisation of agenda items, informal consultations preceding the finalisation of issues, the low or no importance attached to S&D in negotiating and crafting obligations and rights in WTO instruments, and the unsatisfactory content of S&D provisions where they are included in the instruments.
- (ii) Another instance is that technical assistance and capacity building programmes, as designed and carried out, have not reflected the true objectives and principles of S&D.<sup>57</sup> While the CTD has to consider and approve the annual programmes, so far this in itself has not been sufficient to ensure that technical assistance and capacity building activities fully respond to the fundamental needs and concerns of developing countries.
- (iii) A specialised open-ended body for the purpose is appropriate, to facilitate the focused consideration of issues arising and the preparation of specific recommendations for consideration by the CTD. The body would deal with all S&D provisions. This should not be considered as an exercise in proliferating the number of WTO bodies or detracting from the functions of the CTD, for it would be an open-ended sub-committee of the CTD, established solely to facilitate the work of the CTD. It may be noted that it was found appropriate to establish the Sub-committee on Least Developed Countries, though the CTD’s mandate covered issues of least developed countries.

It was on this basis that the Africa Group proposed the establishment of an open-ended sub-committee of the CTD, to work under and report to the CTD, as part of the monitoring mechanism. The other aspect of the monitoring mechanism would be the requirement that all WTO committees or bodies keep S&D as a standing item on their agenda, and periodically prepare reports on S&D.

### 7.3 Standing S&D agenda items

The importance of this additional requirement was demonstrated by what could be considered the convenient reluctance of Canada, leading the other developed countries in this regard, to discuss both the specific and systemic proposals in the special sessions of the CTD. It was just a refusal or delay to earnestly engage with developing countries in carrying out the instructions the Ministers gave to the CTD. Reference or rather abdication to other WTO bodies would have rendered meaningless the ministerial mandate to the CTD to review all S&D provisions. Nevertheless, it may be a sign of things that can happen.

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<sup>57</sup> The principles and objective of S&D need to be clarified and written down as rules to govern the adoption and operation of S&D provisions. The Africa Group proposal contains suggestions for rules stating the objectives and principles of S&D.

Canada insisted that the proposals be referred to the WTO committees dealing with the Agreements where the S&D provisions occurred; at some stage the delegate of Canada said the Africa Group proposal was too technical, while at the same time telling the meeting that she had referred the proposal to her government and was waiting for instructions.<sup>58</sup> Suggestions that delegations needing technical support to discuss the proposals could bring their experts along to the special sessions of the CTD were not heeded.

### **7.3.1 Functions of the proposed subcommittee on S&D**

The functions of the subcommittee on S&D, according to the Africa Group proposal, would be as follows<sup>59</sup>:

- Regular evaluation of the utilisation and effectiveness of the special and differential treatment provisions, with a view to ensuring that the provisions are fully utilised and any problems arising effectively addressed;
- Provision of a framework for initiating and considering recommendations that the CTD could make to Members on complying with obligations under special and differential treatment provisions, as well as on best practice for utilisation of the provisions;
- Accordingly, drawing on among others (a) the reports of the Trade Policy Review Mechanism; (b) reports to be prepared by other international organisations on areas within their remit particularly UNCTAD, the World Bank, the International Monetary Fund and the United Nations Development Programme; and (c) proposals, statements and reports by Members, the Monitoring Mechanism would periodically evaluate the utilisation and effectiveness of special and differential treatment provisions and prepare recommendations to be made by the CTD or through the General Council to Members or the Secretariat as the case may be;
- The Monitoring Mechanism could regularly prepare country profiles setting out detailed and quantified needs, as well as opportunities and benefits, relating to special and differential treatment provisions in order to assist their full utilisation;
- The CTD would regularly hold dedicated sessions on the utilisation and effectiveness of special and differential treatment provisions, to among other things adopt and make appropriate recommendations to Members or the Secretariat;
- The Monitoring Mechanism would specifically have the function of preparing recommendations on whether proposed agreements and instruments to be adopted in the WTO framework, comply with the rules on special and

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<sup>58</sup> The co-ordinator of the Africa Group, Mr Nelson Ndirangu of the Kenya Delegation, quite rightly expressed surprise at this. He said, "I didn't think that at our level of development, we could present a proposal too technical for Canada". HE Ambassador Nathan Iumba of the Uganda Delegation, co-ordinator of the least developed countries, has termed this developed country attitude as "rational ignorance".

<sup>59</sup> Paragraph 10 of WTO document TN/CTD/W//Rev.1/Add.1

differential treatment (to be set out in the Decision under the Doha mandate and as set out in the WTO Agreement).

These functions of the monitoring mechanism would help to ensure that, S&D provisions are operationalised and utilised, and any shortcomings noticed from time to time are redressed.

The Chairman's report summarised this proposal of the Africa Group and its discussion in the following terms<sup>60</sup>:

“The proposal for the establishment of a Monitoring Mechanism was made by the African Group. In the Group's view, among the main functions of the Mechanism would be (i) the regular evaluation of the utilization and effectiveness of the special and differential treatment provisions, with a view to ensuring that the provisions are duly utilized and any problems arising effectively addressed, and (ii) provision of a framework for initiating and considering recommendations that the CTD could make to Members on complying with obligations under special and differential treatment provisions, as well as best practice for utilization of the provisions. There was wide support for the concept, although it was clear that further discussions would be required on the functioning and structure of such a mechanism.”

Perhaps the clearest tangible achievement of the Special Session of the CTD in its work between November 2001 and July 2002, the time the Ministerial Declaration prescribed, was the following recommendation in the Chairman's report to the General Council<sup>61</sup>:

“It is recommended that the General Council agree to establish a Monitoring Mechanism for special and differential treatment, and instruct the Special Session of the CTD to elaborate for the Council's approval, the functions, structure and terms of reference of such a Mechanism, taking into account the proposals made by the African Group, and the discussions that have taken place thereon in Special Sessions of the CTD.”

### **7.3.2 *Establishing the S&D monitoring mechanism and the way forward***

- (a) A specific decision formally setting up the Monitoring Mechanism should be prepared and adopted by the General Council. The decision could be modelled along other decisions that have set up WTO committees, such as the *Decision Establishing the Committee on Regional Trade Agreements*.<sup>62</sup> In simple terms, that decision states that the committee is formed, and prescribes its terms of reference.
- (b) Regarding the structure, the sub-committee would be an open-ended sub-committee of the CTD, working under and reporting to the CTD. But additionally, there would be a requirement that all WTO committees should periodically prepare reports on the operation of S&D provisions, and send copies to the sub-committee.<sup>63</sup>

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<sup>60</sup> Paragraph 7

<sup>61</sup> Paragraph 17

<sup>62</sup> The Committee was established under a Decision of the General Council, dated 6 February 1996, WTO document WT/L/127

<sup>63</sup> There is already an administrative arrangement where other WTO bodies send reports to the CTD on their

- (c) In line with the functions proposed by the Africa Group as reflected in the Chairman's report, the terms of reference of the sub-committee on S&D, established as a permanent and standing open-ended sub-committee, would be to carry out the regular evaluation of all S&D provisions, and preparation of recommendations for the CTD, with a view to ensuring the beneficial utilisation of the provisions.
- (d) It would not be that constructive to engage in a hair-splitting exercise over the functions as distinct from the terms of reference of the sub-committee. Rather, to facilitate its functions, the powers of the sub-committee may be specified as including the competence to request and receive reports and other information from, other WTO bodies, Members, other organisations, and any expert sources; to monitor compliance with recommendations to Members that are adopted by the CTD, the General Council, or the Ministerial Conference; and to make recommendations to the CTD. In this regard, the CTD shall make any appropriate recommendations to Members and for consideration by other WTO councils and committees.

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activities relating to the CTD. The CTD's report to the General Council, in paragraph 15(b), recommends that the CTD may request and receive reports from other WTO bodies in carrying out its work during the extended period.



## **ANNEX I: PROPOSAL BY A GROUP OF DEVELOPING COUNTRIES FOR A FRAMEWORK AGREEMENT**

### Proposal for a Framework Agreement on Special and Differential Treatment.

*Communication from Cuba, Dominican Republic, Honduras, India, Indonesia, Kenya, Malaysia, Pakistan, Sri Lanka, Tanzania, Uganda and Zimbabwe*

The following communication, dated 31 July 2001, has been received from the Permanent Mission of Pakistan.

1. The recognition of inherent inequality of 'players' in the Multilateral Trading System and the special needs and development concerns of the developing countries figured, for the first time, in the Havana Charter. The concept of Special and Differential treatment is a fundamental building bloc of the multilateral trading system. It was conceived in acknowledgement of the fact that developing countries are at a very different stages of economic, financial and technological developments and therefore have entirely different capacities as compared to developed countries in taking on multilateral commitments and obligations. It had, therefore, been accepted that special advantages and flexibilities must be provided to developing countries so that they are able to adopt appropriate national policies to support their trade regime. In essence, therefore, Special and Differential treatment provisions are to be looked at not as exceptions to the general rules but more importantly as an integral and inherent objective of the multilateral trading system.
2. The preamble of the Marrakech Agreement establishing the WTO clearly recognizes the need for positive efforts to ensure that developing countries and the least developed countries secure a share in the growth in international trade commensurate with the needs of their economic development. It is perhaps important to look at the process of the development and elaboration of S&D treatment for developing countries in the multilateral trading system.
3. In the GATT the important milestones in this regard were:
  - (a) Modification of Article XVIII of GATT in 1954-55 to include Article XVIII-B which allowed developing countries to use quantitative restrictions for balance-of-payments (BoP) purposes;
  - (b) Establishment of UNCTAD and the creation of the Committee on Trade and Development in the GATT in 1964;
  - (c) Addition of Part IV on Trade and Development to the GATT in 1965; and
  - (d) Adoption of the Enabling Clause in 1979 at the end of the Tokyo Round. This process signified the growing importance of the S&D treatment for developing countries in the multilateral trading system and, at the very least, the political recognition by developed countries of the need for S&D to attract and accommodate developing countries in the system.
4. Special and Differential treatment was based on the recognition that the developing countries were placed differently in international trade and that these difficulties as well as the imperative of

promoting social and economic development required that the developing countries be treated differently in the Multilateral Trading System.

5. The basic content of S&D provisions consisted of:
  - (i) Better market access for exports by developing countries so that they could boost economic development through exports.
  - (ii) A lower level of obligations for developing countries providing them the necessary flexibility to pursue policy options appropriate for industrialization and economic development and;
  - (iii) A modest level of expectation from developing countries as regards their application of various GATT agreements.
6. One guiding principle for S&D was an acceptance of deviation from the general rule of *quid pro quo* or reciprocity for the developing countries.
7. The concept of S&D underwent a dramatic transformation in the Uruguay Round Agreements. The S&D treatment prior to WTO was in recognition of the special problems of development faced by developing countries, but in the WTO agreements it only recognized the special problems that developing countries may face in the implementation of the agreements. This major shift in the focus from the problems of development to the problems of implementation meant that:
  - (i) It was assumed that the level of development had no relationship with the level of rights and obligations under the multilateral trading system,
  - (ii) The same policies could be applicable for countries at various levels of development. It was thought that all what was required was the grant of short transition periods and technical assistance for the developing countries; and
  - (iii) Developing countries did not have the option to sign or otherwise on the various agreements because all of them, excepting four plurilateral agreements, were part of the Single Undertaking.
8. This dramatic erosion of S&D treatment was further compounded by the fact that the WTO agreements went far beyond the traditional border measures covered under the GATT and included many more areas of domestic economic policy making. In addition, these agreements were enforceable through a binding dispute settlement mechanism under the WTO.
9. The Uruguay Round Agreements shifted the thrust from enhanced market opportunities to grant of transition periods and technical assistance. The developing countries could hardly benefit from the almost 145 S&D provisions (in the Uruguay Round Agreements) which mostly do not go beyond a best endeavour promise and therefore are not legally enforceable. Lack of any mechanism to ensure effective implementation of S&D provisions in the WTO has been a major area of concern for developing countries.
10. It is imperative to undertake a thorough review of the concept of S&D, as its basis objective is to create a level playing field for unequal players in the Multilateral Trading System. This should be seen in the establishment of a concrete and binding S&D regime which is responsive to the development needs of the developing countries. There is an urgent need for such S&D regime that mainly focuses on enhancing market access opportunities (for developing countries) and provides

policy options aimed at unlocking their growth and development potential. The guiding basis, therefore, should be that;

- (i) the liberalization of trade is not an end in itself but the means to an end, that is, economic growth and development of all Members; and
- (ii) different levels of development achieved by members require different sets of policies to achieve economic growth and development.


11. First, because developed countries, too, have enjoyed such flexibility and differential treatment during their earlier periods of economic development. In fact, some of them are still getting such treatment, particularly in areas such as textiles and clothing, and agriculture. Second, in this age of interdependence, the long-term prosperity of developed countries depends on the economic development of developing countries. S&D treatment that facilitates developing countries to grow and develop will ultimately benefit all not just in terms of more and affluent markets but also by ensuring a more peaceful world.
12. The system and the rules should ensure equal participation by, and equal benefits to, all. In the immediate/short term, all the existing S&D provisions in various WTO agreements should be fully operationalized/implemented. The implementation should go beyond technicalities and include operationalization of provisions that presently lack operational modalities.
13. In the medium term, the agreements should be suitably amended in the light of the experience by the developing countries that these provisions fall short of providing necessary flexibility to pursue appropriate policies and facilitate economic development in the developing countries. The WTO must demonstrate sensitivity to developmental objectives of majority of its Membership and to sustain credibility. Many of the Implementation proposals submitted by developing countries, in the backdrop of, uneven growth and development in the years following the establishment of WTO, can be viewed as an initial endeavour for extension and elaboration of enhanced, effective and a binding S&D regime.
14. In order to institutionalise and rationalize the adoption and application of S&D provisions in various WTO Agreements, WTO Members should elaborate a framework/umbrella agreement on S&D treatment which should include provisions reflecting the objectives and principles of S&D treatment for developing countries, as outlined above. The Doha Ministerial should recognize the importance of this issue and agree to the negotiation of such a “framework” agreement on S&D.
15. Some of the elements that can form part of the Agreement on S&D could be as follows:
  - Special and Differential treatment shall be mandatory and legally binding through the dispute settlement system of the WTO (including notification requirements and inclusion of these commitments in country schedules).
  - In any future agreement, that the Members may agree, there shall be an evaluation of the development dimension. This evaluation should include the fact as to how these agreements facilitate attainment of developmental targets (e.g. as set out in the Millennium Declaration).
  - The Members shall undertake an evaluation of the implications of any future agreement, with respect to implementation costs in terms of financial, capacity building and technical assistance, etc.

- The transition periods shall be linked to objective economic (debt level, level of industrial development, human development index, etc.) and social (literacy and life expectancy) criteria.
  - Without an evaluation of the fact whether an Industrial Policy has a demonstrable adverse impact on trade, there shall be no prohibition of policies that promote growth and development in developing countries.
  - The application of the concept of Single Undertaking for developing countries should not be automatic.
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In this policy brief, Dr. Francis Mangeni rests his analysis of the debate on special and differential treatment at the WTO on the question whether developed countries are willing and able, first, to support re-balancing changes to WTO rules, and second, to put their resources into programmes, that directly address the constraints developing countries face beyond seeking to comply with their obligations, to equitably or competitively benefit from opportunities the multilateral trading system is supposed to avail. He states that the characteristic nature and outcome of the debate will depend on to what extent the answer to this question is in the affirmative. With remarkable candour he tackles many of the controversial issues such as the question of which countries should be the object of differentiated treatment (what many refer to as graduation), the rationale for a monitoring mechanism for the effective implementation of differentiation and the ever-thorny issue of technical assistance and capacity building. If African countries are to benefit from trade policy in order to advance the sustainable development goals defined by their societies, trading partners in the multilateral system will have to enable them to do so.

