

Doha Mandates

"We reaffirm that provisions for special and differential treatment are an integral part of the WTO Agreements. We note the concerns expressed regarding their operation in addressing specific constraints faced by developing countries, particularly least-developed countries. In that connection, we also note that some Members have proposed a Framework Agreement on Special and Differential Treatment (WT/GC/W/442). We therefore agree that all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational. In this connection, we endorse the work programme on special and differential treatment set out in the Decision on Implementation-Related Issues and Concerns."

(Paragraph 44 of the Doha Ministerial Declaration)

Special and Differential Treatment

Prospects for Cancun

Seventeen gruelling months and three missed deadlines into a mandate that was supposed to last only nine months, the review to strengthen special and differential treatment (S&D) provisions is sure to maintain its role in Cancun – like implementation issues and agriculture (Doha Briefs No. 1 & 2) – as a central yardstick of whether the negotiations launched in Doha truly live up to the highly touted 'development' agenda.

In the lead-up to the 5th Ministerial, General Council Chair, Ambassador Perez del Castillo (Uruguay), was working feverishly to help Members find agreement on a pro-development 'early harvest' (i.e. early package) to be adopted at Cancun. If pre-Cancun consensus cannot be found however, the task of striking a deal could fall squarely on the shoulders of the Ministers themselves. Generally speaking, questions abound over what Cancun holds for the broader S&D mandate.

Will Members continue to focus solely on the remaining agreement-specific proposals that developing countries have submitted or will the Special Session of the Committee on Trade and Development (CTD-SS) restart its work on the controversial cross-cutting issues¹ and the monitoring mechanism? How will Members proceed, and in accordance with what timeline, on the mandate to consider the incorporation of S&D into the architecture of WTO rules? These are just some of the questions most developing country Members are hoping to have answered by the time Cancun is done.

If the current draft Declaration is any indication, the CTD-SS will indeed restart its work on all three items, mandated simply to "report on progress" to the 6th Ministerial. With missed deadlines and ambiguous mandates unquestionably expected to factor into any deal reached at Cancun, a key question on S&D is whether developing countries will be willing (or required to) 'pay' – for a third time

they would argue – for a new deadline and a clear mandate.

The question of linkages – trading-off for example S&D aspirations for movement on agriculture – appears to hold a clear answer for numerous developing country delegates: "there are none." The key 'demandeurs' for S&D, mainly Africa and the LDCs, have been resolute on demanding meaningful S&D and are unlikely to give up on the mandate at this stage. Whether they plan – or more importantly, are able – to flex sufficient muscle so as to withstand the pressures that come with holding up movement in the work programme (on S&D or elsewhere) will undoubtedly shed greater clarity on the destiny of the S&D review. In this regard, a commitment to hold out for effective and meaningful '*more favourable treatment*' from as broad a spectrum of developing countries as possible will be of paramount importance.

Background²

One of the most contentious issues to face the multilateral trading system is the debate over differentiated rights and obligations between developed and developing countries. While it is now generally accepted that countries at lower levels of development should be accorded more favourable treatment, the form and content of such treatment remains hotly contested.

The concept of favourable treatment for developing countries has a long history in the GATT/WTO, and has evolved in parallel with changes in international economic relations as well as in theories of development. In today's WTO system, these issues generally fall under the rubric of 'special and differential treatment'. Although not exclusively, the roughly 155 S&D provisions scattered throughout the WTO Agreements form the core of what is considered the 'development' dimension of the multilateral trading system. During the Uruguay Round, the concept of S&D changed from one of providing a range of flexibilities and

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According to paragraph 12 of the Decision on Implementation-related Issues and Concerns, "The Committee on Trade and Development is instructed:

(i) to identify those special and differential treatment provisions that are already mandatory in nature and those that are non-binding in character, to consider the legal and practical implications for developed and developing Members of converting special and differential treatment measures into mandatory provisions, to identify those that Members consider should be made mandatory, and to report to the General Council with clear recommendations for a decision by July 2002;

(ii) to examine additional ways in which special and differential treatment provisions can be made more effective, to consider ways, including improved information flows, in which developing countries, in particular the least-developed countries, may be assisted to make best use of special and differential treatment provisions, and to report to the General Council with clear recommendations for a decision by July 2002; and

(iii) to consider, in the context of the work programme adopted at the Fourth Session of the Ministerial Conference, how special and differential treatment may be incorporated into the architecture of WTO rules."

'spaces for development policy' based on economic criteria to one of time-limited derogations from the rules, with more favourable treatment regarding tariff and subsidy reduction commitments, and more generous thresholds in the application of market defence measures (e.g. countervailing and anti-dumping duties). As such, S&D can be said to have evolved from an instrument for making trade liberalisation supportive of development (in GATT), to its current manifestation (in the WTO) as an instrument for helping developing countries develop the legal and institutional capacity to undertake their trade liberalisation obligations.

The 'bargain' struck in return for accepting this transformation of S&D – in addition to binding disciplines in areas formerly optional (i.e. subsidies, anti-dumping, technical barriers to trade, etc), as well as new obligations in intellectual property, services, and investment-related measures – was the combination of greater market access for agricultural goods and textiles, and meaningful provisions on S&D. The latter were expected to provide sufficient derogations from the new rules, and to establish obligations for developed countries on technical assistance and preferential market access, so as to allow, in theory, developing countries to capture more gains from trade.³ In practice, however, these expectations did not materialise for the bulk of developing countries, as most S&D provisions were couched in non-mandatory language and thus unenforceable under the newly strengthened dispute settlement procedures.

Consequently, the Doha mandate adopted by Ministers represented an attempt to redeploy some of the 155 S&D provisions as tools that would better confer the benefits of their original intent. This was to be done by strengthening them and making them more effective and operational – and if necessary, by turning some 'best-endeavour' language into firm obligations. To carry out that mandate, the Trade Negotiations Committee (TNC) – the body responsible for overseeing the Doha negotiations – decided in early 2002 that the mandate on special and differential treatment would be dealt with in Special Sessions of the Committee on Trade and Development (CTD-SS).

Mandated Deadlines

By 31 July 2002, the CTD was to report to the General Council "with clear recommendations for a decision" on items within its mandate to review "all special and differential treatment provisions [...] with a view to strengthening them and making them more precise, effective and operational" (Ministerial Declaration

para. 44). In particular, it was to report on the identification of the mandatory provisions, the consideration of the implications of converting non-binding provisions into mandatory ones, and the identification of those to be made mandatory. Furthermore, it was to report on "additional ways" to make S&D provisions more effective. Not bound by the July 2002 deadline were considerations of how S&D provisions might be incorporated into the architecture of WTO rules (para. 12.1).

With Members unable to make much headway on the mandate, the deadline has been missed three times – in July and December 2002, as well as February 2003. No further deadlines have been established to date (see below).

Current State of Play

Although the TNC originally assigned the mandate on S&D to the CTD-SS, it now resides with the WTO's highest decision-making body, the General Council. After missing three deadlines, Members could not agree on how to proceed with the various proposals submitted under the review. This stark divergence of opinions – which is rooted in a fundamental difference of interpretation over the S&D mandate (see below) – led the CTD-SS to adopt a report in February 2003 (TN/CTD/7), which, *inter alia*, requested the General Council to clarify the mandate "as it considers appropriate", as well as to provide the legal and practical means to give it effect.

The CTD-SS adopted this report by consensus, however the US, EC, and Australia reportedly blocked its adoption by the General Council – citing the bad precedent such a clarification would establish. Consequently the General Council "took note of the report", but reverted the matter to a later date so as to allow the incoming General Council Chair (Ambassador Pérez del Castillo) to undertake consultations on how to proceed.

After undertaking consultations, Chair Pérez del Castillo suggested in April 2003 (JOB(03)/68) that "the best way to enable [Members] to move forward" was to proceed on the premise that all 88 proposals would be addressed, "without prejudging the results", and that an informal categorisation of the 88 agreement-specific proposals was necessary to move ahead. By extension, the requested clarification of the mandate would not occur – which Ambassador Pérez del Castillo had reportedly been told by the major trading powers would lead nowhere.

A number of developing countries had serious reservations about abandoning the request for clarification, which they felt was essential for moving towards an agreeable solution. Furthermore, the Chair's process (similar to one rejected

in late-2002) posed concerns, especially with regards to proposals that could go to subsidiary bodies and thus be exposed to trade-offs. Here the worry was that these proposals would go the way of implementation issues (i.e. that they would become lost in the bodies' onerous work programmes and see little movement; Doha Round Brief No. 1).

To allay their concerns, Ambassador Pérez del Castillo insisted that progress was best served by focusing exclusively on the 88 agreement-specific proposals, as opposed to the cross-cutting ones, which developed countries had earlier pushed to have dealt with concurrently (see below). He further believed that developed countries had given up some of their rigidities surrounding the possible outcome of the exercise, specifically noting that he had received assurances as to their willingness to look at changes in the existing balance of rights and obligations and/or possible amendments to existing WTO texts – seemingly a subtle shift towards a pro-development interpretation of the mandate. Thus, in the spirit of finding a way around the impasse, developing countries agreed to move ahead on the basis of the Chair's proposal.

In May 2003, a list dividing the 88 proposals into three categories was circulated (Job 3404). The first category, which has been the focus of intense discussions pre-Cancun, tackles 38 proposals that could be agreed on before/at Cancun. The second category comprises another 38 proposals that were sent to relevant WTO bodies in late-May – with reports due just prior to Cancun (and the possibility of inclusion in the early harvest). Category three, the 15 proposals on which delegates have had most difficulty in finding consensus, would be examined with regard to how they might be redrafted while preserving their concepts.

A number of revisions of the language of certain 'Category I' proposals were circulated – with the help of a 'Friends of the Chair' group comprising Brazil, Kenya, Bangladesh, the US, the EC and Norway – in July and August. While Members have arguably 'agreed' on 17 proposals to-date, pervasive differences of opinion remain, and an early harvest package is not yet in sight.

Concerns raised by developing country Members, including some of the 'Friends', revolve around their view that the texts do not adequately reflect the discussions from the various fora, nor do they fulfil the objectives of the original submissions. One 'Friend' reported a fairly consistent "four against two", with Brazil often siding with the developed countries. Such differences were also responsible for the failure to resolve the latest stumbling block to arise – the insistence that no automatic flexibilities,

exceptions, and/or assistance should be granted to developing countries should be granted. Commenting on the 15 proposals 'agreed' to so far, an African delegate said that developing countries "would almost be better off forgetting about [them]", as they offered very little in terms of meaningful economic benefit.

Thus with a cavernous gap currently seeming too large to overcome, the move to offer an early harvest will see one last pre-Cancun attempt at the end-August General Council meeting.

Of the 38 'Category II' proposals sent to relevant WTO bodies, five formal reports, representing 20 proposals, have thus far been submitted – on agriculture (G/AG/17 & TN/AG/11); trade-related investment measures (G/L/638); rules (TN/RL/7); and safeguards (G/SG/64). One observer summed up the overall progress on these items as "nothing concrete" so far.

On the twelve 'Category III' proposals, one developing country delegate indicated that as of early August "not a single discussion on Category III proposals had taken place so far."

The crux of the impasse

The differences between Members over the exact meaning and implications of the mandate on S&D have been squarely at the centre of discussions. In particular, the methods Members have at their disposal to 'strengthen' S&D provisions and make them more "precise, effective and operational" have been called into question. This is linked to the broader debate underway as to whether perceived systemic imbalances should be dealt with under the umbrella of reciprocity, i.e. the exchange of comparable concessions (Doha Round Brief No. 1). Members have also, at various times, jockeyed over the sequence in which to address the agreement-specific proposals (which have been the exclusive focus since February 2003), cross-cutting issues (such as those on the 'principles and objectives', and eligibility) and the monitoring mechanism.

Most developing countries contend that the Doha mandate on S&D is to make effective previous negotiations. Such a process, they say, requires meaningful changes to language in the WTO Agreements, and possibly changes to Members' rights and obligations. This exercise should not be viewed as new negotiations, which might be open to trade-offs in other sensitive areas such as agriculture or investment. Ministers, they believe, clearly acknowledged this with both the language and the July 2002 deadline of the mandate, which kept the S&D review well clear of the March 2003 deadlines in agriculture or the contentious decisions due at the 5th Ministerial on investment and competition. Furthermore, most

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"The work of the Committee on Trade and Development in this regard shall take fully into consideration previous work undertaken as noted in WT/COMTD/W/77/Rev.1. It will also be without prejudice to work in respect of implementation of WTO Agreements in the General Council and in other Councils and Committees".

Para. 12.2 "reaffirms that preferences granted to developing countries pursuant to the Decision of the Contracting Parties of 28 November 1979 ('Enabling Clause') should be generalised, non-reciprocal and non-discriminatory."

agree that the mandate on the agreement-specific issues – which some argue is the only mandate that exists – must be finished before moving ahead to consider other items.

Developed countries, for their part, have stated that the mandate on S&D does not launch new negotiations (or any negotiations for that matter). The implication of this, in their view, is that no changes that would fundamentally alter the ‘balance of Members’ rights and obligations’ can occur under the current review. Any attempts to do so, they continue, are thus rightly placed with the relevant negotiating body responsible for the area (e.g. for S&D in subsidy disciplines, the Negotiating Group on WTO Rules) – wherein they would be open to trade-offs. The developed country position on exactly how Members are to proceed with the mandate without making significant changes in languages remains unclear.

In many ways, it is the answer to this question that developing countries were hoping to get with the clarification from the General Council. With that request falling on deaf ears, at least prior to Cancun, it would seem that the chasm between Members is unlikely to be bridged anytime soon. As put forward above, whether developing countries are willing (or expected) to ‘pay’ for this clarification in Cancun remains unclear.

Agreement-specific versus Cross-cutting Issues

Developed countries have argued that prior to evaluating the 88 proposals, detailed discussions on the broader ‘principles and objectives’ of S&D must occur (TN/CTD/W/20; 26; 27). They generally view S&D as a means of integrating developing countries into the multilateral trading system and insist that the WTO must provide one set of rules for all Members. They appear willing, however, to consider some derogations for certain countries at lower levels of development for some period of time. This approach stems primarily from the fact that developing countries in the WTO are self-designated (i.e. no explicit definition exists,

although LDCs are defined according to UN criteria). As developed countries object to both India and Honduras being eligible for the same S&D benefits, a number of them have indicated that the outcome of the review will be limited in the absence of criteria for eligibility (i.e. providing criteria to determine which Members are eligible for what flexibilities, and for how long). The eligibility debate is central to the resolution of the most significant substantive controversies on S&D. Some developed and developing countries have expressed sympathy for the need to establish a system of development thresholds and trade performance targets to guide the application of rules and their flexibilities or modulations. However, this type of discussion is difficult given the less than constructive dynamics prevailing in these discussions.

Indeed, while some developing countries recognise that “the principles and objectives of S&D need to be clarified and written down to govern the adoption and operation of [S&D] provisions,” (TN/CTD/W/23), most maintain that strengthening the specific provisions on S&D is the only aspect to the Doha mandate, and thus the current work programme should limit itself to just that. Regarding controversial issues such as eligibility, most developing countries agree that despite the willingness of some to address these issues at some point, it can only come after the completion of the agreement-specific mandate.

Monitoring Mechanism – What, How, When?

Agreement on the proposal of creating a ‘monitoring mechanism’ was the only proposal accepted outright in the 31 July report (TN/CTD/3). This agreement ‘in principle’ however, said nothing of the vastly divergent views Members held regarding the mechanism’s role and implementation date.

Developing countries, which made the initial proposal (TN/CTD/W/3, 3/Add.1, & 23), see the mechanism as a monitor of the effectiveness of the outcome of the current (and future) S&D review(s). It would operate as an open-ended ‘Sub-

Committee on S&D’ reporting to the CTD, with the ability to make recommendations directly to the GC (based on inputs from other bodies). As such, it would only come into effect after the current review is completed.

Developed countries see the mechanism coming into force immediately and monitoring the effectiveness of S&D treatment in integrating Members into the multilateral trading system (TN/CTD/W/19 to 21); as well as monitoring the elements of the agreement-specific proposals referred to the various bodies. The mechanism would also, according to the US, play a role ensuring greater coherence between the WTO and other relevant international institutions. Elaborating the cross-cutting issues would also come within its ambit. In effect, it would take over the duties of the CTD-SS.

Endnotes

- 1 These relate to the principles and objectives of S&D; the issue of eligibility; benchmarking; technical assistance and capacity building; transition periods; trade preferences; utilisation; and universal or differentiated treatment.
- 2 This section draws on ICTSD, *Spaces for Development Policy: Revisiting Special and Differential Treatment* (2003)
- 3 This highlights the two ‘dimensions’ of S&D: In the first dimension, related to the demand-side, S&D should assist developing countries to obtain more effective market access and fair trade conditions for their exports. The second, related to the supply-side, should enable developing countries to implement active policies to stimulate competitiveness (thereby allowing them to take advantage of market access opportunities and better translate export growth into development). ICTSD (2003).

All CTD-SS proposals can be found at <http://docsonline.wto.org>, using the document symbol TN/CTD/*.
Draft language from the 2003 General Council consultations can be found at http://www.ictsd.org/ministerial/cancun/documents_and_links.htm

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