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**Updating the Concept of
Special and Differential Treatment
(SDT) for Developing Countries in
Multilateral Trade Policy**

Research Report

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Background and objectives

This small research project has begun a dialogue at the policy level and has established research parameters aimed, in both cases, to avoid a stalemate in the Doha Round. The combination of binding dispute settlement with the broad Doha agenda, involving as it does potential new multilateral trade rules with complex and obscure effects, has made many developing countries (DCs) wary.

DCs are reluctant to agree new rules, the full consequences of which they do not understand, when implementation might prove costly (in administrative, financial or political terms) but non-implementation might leave them open to (the threat of) dispute settlement. Yet a failure to advance in the Doha Round could also be damaging for DCs, not to mention the multilateral trading system. It would spur bilateral and plurilateral agreements.

The existing provisions for special and differential treatment (SDT) are moribund and the economic analysis on which they were based is largely discredited. But it does not follow that the only alternative is a 'one size fits all' regime in which a single set of rules applies uniformly to all WTO members.

The underlying 'idea' of this project is that new forms of SDT can be identified that:

- ◆ are relevant to the trade issues under discussion in the Doha Round;
- ◆ do not run counter to prevailing economic orthodoxy; and indeed
- ◆ are essential if the Doha Round is to be brought to a successful conclusion.

Method

Because the new areas of trade policy require different forms of SDT the subject is a very large, under-researched one. This initial project has built upon existing knowledge. It has provided resources (mainly research time, supplementary travel, research support, and workshop costs) allowing the principal researcher to add value to this material.

The project has included:

- ◆ a literature survey;
- ◆ the analysis of trade data;
- ◆ discussions with officials in the WTO (and country representation in Geneva), the UK Government, the European Commission and other relevant organisations, such as UNCTAD;
- ◆ initiating a dialogue via existing networks of academics, policy-makers and opinion-formers to develop understanding of the types of SDT that might be desirable and the criteria for establishing eligibility;
- ◆ a workshop and a presentation to a World Bank seminar, and an issue of the *IDS Bulletin* (to be published in 2003).

The hypothesis is that the nature of 'new trade policy' both justifies SDT and requires that its form be different to the current model and less easy to generalise across policy areas. This requires conceptual and empirical development of the issues (undertaken in this project) which will lead on to more detailed research (partly to be identified as an output of the project).

The key requirement to justify SDT is that there exist areas of multilateral trade policy in which states have neither identical interests nor interests so dissimilar that their uniqueness

can be reflected only in specific variations in their national WTO schedules. In such cases the task is to identify the characteristics of these groups, the reasons for separate treatment under the WTO rules, the means to implement any differentiation, and the countries that share the distinctive features.

A broad framework for such analyses still needs to be developed. There is no equivalent to the well-established methodology for assessing tariff cuts in some of the new areas of trade policy. What, for example, are the general effects of granting national treatment to insurance service providers or *sui generis* protection to the owners of intellectual property rights on seeds?¹ Basic methodological work still needs to be done to answer such questions, and disciplines in addition to economics are likely to be required.

The project has made a distinctive contribution to this huge task. Using the multidisciplinary knowledge of the researchers it has:

- ◆ provided an initial articulation of the concept of new forms of SDT, identified the principal areas in which it may be justifiable, the types of treatment that might be justifiable, and the broad characteristics of the countries that may be involved;
- ◆ advanced a broad methodology for more specific, detailed research to be undertaken over the next 3–5 years that will inform the WTO negotiations as they evolve.

The work was undertaken largely over an elapsed period of 12 months, starting in the second half of 2001.

Findings

The decline of 'old SDT'

The *status quo* is that the 'old SDT' is being eroded where enforceable, and is often unenforceable in relation to 'new trade issues' (see, for example, by Michalopoulos 2001, Whalley 1999 and Fukasaku 2000). In essence, the conventional wisdom is that:

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

Most legally enforceable SDT is an eroding asset in the sense that it provides modulation of commitments, the vitality of which will decline directly (if time limited) and indirectly (if it relates to removal of barriers that all members are reducing over time). Hence, the implementation delays under the Uruguay Round Agreements on Trade-Related Aspects of

¹ See, for example, *Trade and Investment Briefs* Nos 1, 5, 6, 7, 8 and 10 (IDS–DFID 1999), edited by Christopher Stevens.

Intellectual Property Rights (TRIPs) and Agriculture (AoA) cease to provide differential treatment once the extended timetable has expired. Similarly, SDT provisions that require DCs to liberalise/reduce subsidies etc., but to a lesser extent than ICs, will in due course cease to have validity when the DCs' remaining barriers reach very low levels.

It is true that in cases where least developed countries (LDCs) have been exempted from tariff/subsidy reduction altogether their concessions will not be eroded in this way. But many vulnerable DCs do not fall within the LDC group.

The problem in the new areas of trade policy (such as TRIPs, services, government procurement and competition policy) is that it is far from clear what form effective SDT would take. Evidently, the removal of formal market access barriers is either irrelevant or a minor aspect of rule formation. Hence, the 'traditional recipe' of slower, more limited barrier removal is not relevant.

At the same time, even in cases where the form of SDT has been identified the modalities remain an area of controversy. It has been argued, for example, that TRIPs adopted inappropriate SDT by agreeing extended, but time limited, implementation periods for DCs and LDCs. The provision that DCs implement TRIPs within 5–10 years, and LDCs within 11 years, implies that some organisation has assessed the implementation capacity of these states and concluded that this is a realistic time period. But, of course, no such assessment has ever been made. The agreed figures are purely 'negotiated ones', i.e. dates which all parties actively or passively were willing to accept. They could be too long – and by the same token they could be far too short. And, whilst the SDT provision for the LDCs allows for an extension on request, the agreement still provides no objective basis on which to assess whether or not such a request is justifiable.

Is there a case for new SDT?

Old SDT is in decline: should it simply be buried or is there a case for new SDT? There is both an analytical and a political answer to the question.

The fundamental political argument in favour of a new form of SDT is that closure in the Doha Round may be impossible to achieve without it. Or, rather, closure in the Doha Round on the basis of reasonably precise new rules and a continuation of binding dispute settlement may be unlikely.

The two caveats are important. For there to be closure within the WTO there must be consensus. And for there to be consensus one of two conditions must be satisfied.

- ◆ Either all members must acquiesce in the rules that have been proposed.
- ◆ Or there must be let-out clauses for those that do not acquiesce.

In the past, it could be argued that SDT has applied much more widely than described above and benefited a very wide range of members. This 'informal' SDT was achieved by incorporating into the GATT texts vague phrases that could be interpreted in different ways by different members.

The innovation of the Uruguay Round to make dispute settlement binding has removed this escape route. This fact was not necessarily fully recognised by all (or even most) parties to the Uruguay Round. The subsequent striking down by the WTO of the US offshore tax regime and the EU banana regime, for example, has concentrated minds.

Consequently it is unlikely that by the end of the Doha Round countries will be willing to put their trust in vague phrases which might subsequently be defined in unexpected ways by a Dispute Settlement Panel. One approach to the problem is to weaken the current provision for binding dispute settlement. The other is to create new, more robust forms of SDT. In the absence of either there is a danger that rule-making will move outside the multilateral arena and become plurilateral or regional/bilateral.

From an analytical point of view, the fundamental criterion for SDT is that, in the area being negotiated, there should be a recognition that a 'one size fits all' approach is not necessarily appropriate. Almost all WTO members adopt this principle to a greater or lesser extent in their domestic economic policy. This is in recognition of the political, if not the economic, necessity to treat some areas/groups differently from others. Such considerations apply *a fortiori* at the global level.

If the default assumption is that this fundamental criterion is normally present, then three further criteria are required to support a case for SDT. They are:

- ◆ the interests of each member must not be so different that they require unique treatment;
- ◆ there must be some way to identify broad groups of countries that share sufficiently similar characteristics to warrant the uniformity of treatment among themselves but differential treatment compared with others; and
- ◆ there must be some actionable mechanisms that relate to these shared differences and to the rules that are being proposed.

In a sense every country is different, and each one makes its own, independent commitments during WTO Rounds. But achieving differentiation through national schedules presents either an infeasibly large negotiating burden or substantial post-agreement risks. Without any agreed modulation in general principles, such action would be highly vulnerable to subsequent dispute settlement in which one party argued that another's implementation schedules did not fully reflect the general principles that had been agreed.

The characteristics of a new SDT

Whilst recognising, therefore, that every country is different, it is highly desirable to identify broad groups with similar characteristics that can be reflected in modulations to the general principles incorporated in the Doha Round texts. But how are such characteristics to be measured? Work by the OECD has shown the shortcomings of most 'off-the-peg' indices, and has contributed to the task of assessing new combinations of criteria (OECD 2001). From this it is clear that much work remains to be done. The more imprecisely defined the characteristics of group members, the more bland the agreed SDT is likely to be.

Finally, having identified groups with common features it is also necessary to identify specific, actionable modulations in the rules that answer to these characteristics. Without this link, SDT will tend to be exhortatory rather than legally enforceable.

There are two types of problem with defining relevant, actionable SDT. In cases where the proposed new rules require governments to do something positive which is within their power, the issues are the ones familiar from old SDT. Are the proposed changes more burdensome for poorer countries (as supporters of SDT have tended to argue in the past) or more necessary (as their opponents have claimed)? The second type of problem arises in cases where governments are required to do something positive that is not within their power. Some of the criticisms of TRIPs (IDS–DFID 1999) and of the Customs Valuation Code

(Finger and Schuler 2000) argue that the actual and opportunity costs of compliance are too high.

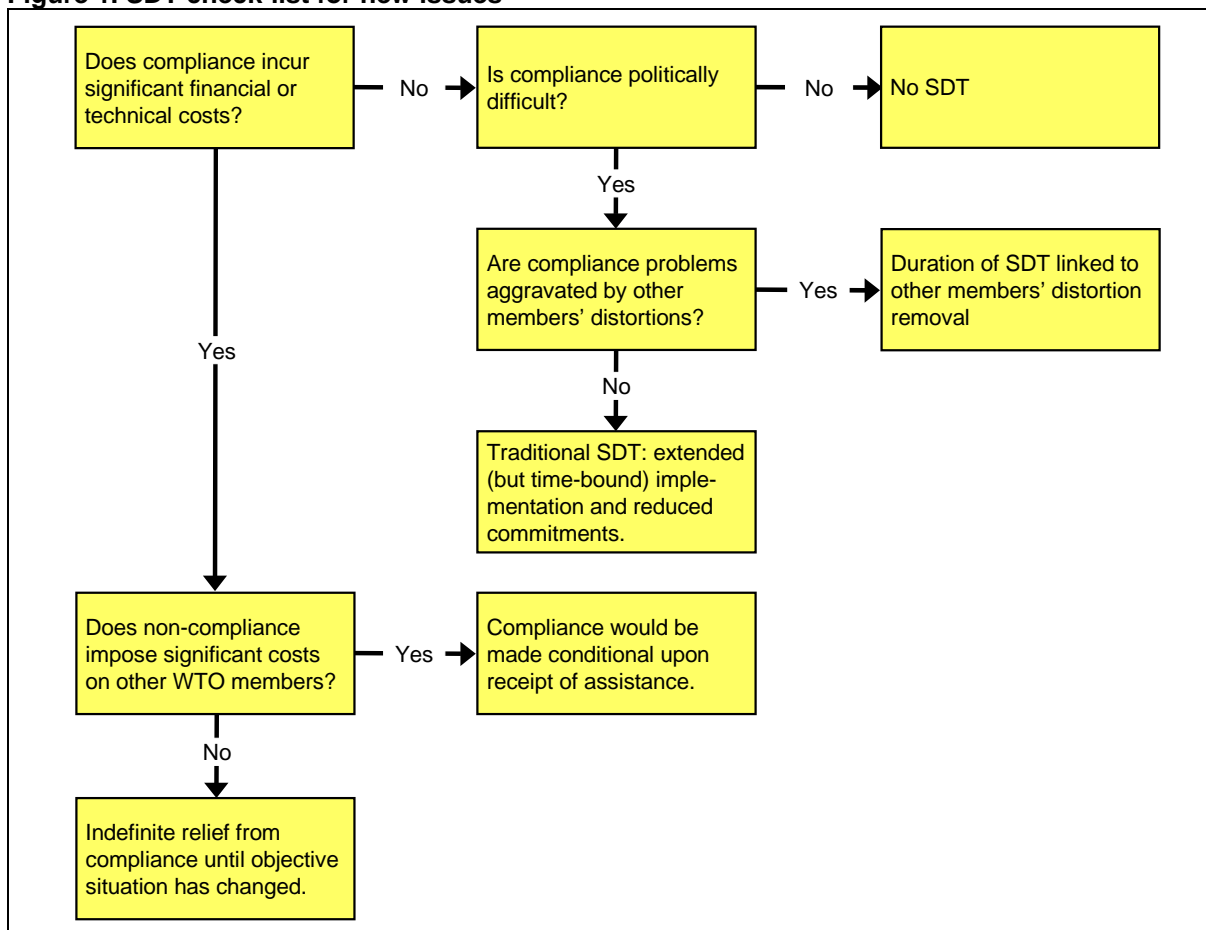
A template for new SDT

Figure 1 presents a decision-making tree to assess the ways in which different types of problem might lead to various solutions. Following that, Table 1 suggests some potential criteria around which group selection could occur.

The first step suggested in Figure 1 is to distinguish between the two different types of ‘cost of compliance’:

- ◆ the more traditional ‘cost’ that the proposed new rule is politically unacceptable to a country; and
- ◆ the newer problem that implementation may incur financial, technical or human resource costs that are either beyond the scope of government or have a high opportunity cost.

Figure 1. SDT check-list for new issues



The degree to which the WTO could tolerate non-compliance will be affected by the disruption to world trade that is likely to result. In the case of poor countries accounting for a small share of trade, non-compliance is unlikely to impose any significant costs on third parties. In such cases it could be permitted indefinitely. Compliance could either be left to subsequent negotiations or linked to some objective criterion which would have to be achieved before compliance were required.

In cases where other WTO members are not willing to acquiesce in indefinite SDT, there could be a case for linking compliance to the provision of appropriate financial and technical support. This would overcome the structural problem that the WTO cannot commit those bodies that would be involved in providing support. Despite this jurisdictional problem, SDT would still be enforceable because it would allow the recipient to defend its practices within dispute settlement in the absence of the identified support having been made available.

If implementation does not impose costs we are in the more traditional realm of SDT debate. But hitherto the issue has largely been couched in terms of the developmental (un)desirability of WTO rules. In Figure 1 the issue is couched in a more general question: is compliance politically difficult? The reason for this is to extract this *pragmatic* case for SDT in relation to WTO rules from a debate of development paradigms. The pragmatic case for SDT encompasses, but is not limited to, straightforward (sic) issues of rules that are developmentally undesirable. Its underpinning is that consensus decision-making will limit the introduction of new multilateral rules if some members refuse to acquiesce.

Table 1 takes the situations described in Figure 1 and suggests some indicators of the criteria to establish the eligibility of a state for SDT, and those that would determine when the dispensations granted would come to an end. The rows distinguish between situations in which the problem is primarily political and those where it is primarily cost.

Table 1. Group selection criteria for ‘new trade’ policies

Nature of ‘problem’	Possible indicators of:	
	Eligibility	Readiness to comply
1. Implementation involves high political costs	Low relative share in world trade in relevant area	Expiry of extended timetable
2. Ditto – with distortions	Criteria of vulnerability as a result of the distortions	Removal of pre-identified distortions
3. Implementation involves high costs (financial, administrative or technical), e.g. TRIPs, Customs Valuation	Low absolute level of government expenditure in relevant area Low absolute domestic revenues Low relative share in world trade in relevant area	Receipt of specified volumes of financial/technical assistance
4. Ditto	As above, but high share in world trade in relevant area	Reaching pre-set threshold for absolute expenditure/revenue achieved

In cases where there is no objective problem with compliance, but governments are unwilling to sign up to ‘the full deal’, much will depend upon whether or not non-compliance would impose significant costs on the rest of the WTO membership. If it would not, then the suggestion is that policy should be fairly permissive. Provided that the granting of SDT has in-built conditions for ultimate compliance of a fairly simple kind (such as an extended timetable), the assumption should be that it can be granted. In cases where there is a case made for longer-term exemptions (for example because of vulnerability to distortions caused by permitted interventions by other members), then the justification for SDT would include a listing of the problem policies and their anticipated consequences. The identification of an appropriate benchmark for withdrawal of SDT would, hence, be an inherent part of the granting process.

In the case of problems involving the high cost of implementation, the criteria of eligibility would relate to indicators relevant to such costs. In the example of the customs valuation code or the administration of justice under TRIPs, for instance, the criteria would relate to the absolute level of government expenditure on customs or legal administration.

At what stage would SDT end? The answer suggested in Table 1 is that this would depend partly on the ‘cost’ of non-compliance to the rest of the international community. In cases where non-compliance imposes trivial costs on the rest of the world, it should be as soon as

the country concerned wishes it to do so or has reached the threshold criteria that established eligibility in the first place. Arguably, the WTO should not be the primary forum within which the ending of exemptions is discussed. On one view the locus for deciding whether or not to comply in future is the domestic one of the country concerned. To the extent that foreign actors are involved in the process, the Poverty Reduction Strategy Paper is a more appropriate focus for such influence than is the WTO.

Next steps

Many questions remain unanswered, but will need to be addressed before the final stages of the Doha Round. The implication of the analysis presented above is that there are many competing indicators around which SDT groups could coalesce, and it is evident that most DCs will be keenly interested in ensuring that the ‘right’ combination (which includes them as members!) is the one selected. The debates that have already occurred in relation to the Development Box proposal for the AoA illustrate the practical realities of attempting to achieve agreed, meaningful differentiation within the WTO. No sooner has a coherent formulation been proposed than states that might be excluded lobby to have the criteria altered in such a way as to cover their specific circumstances.

It may be possible to defuse somewhat this contentious process before the detailed lines of proposed new commitments in each of the areas under negotiation are established. What is required from the research community is, over the next 2–3 years, to begin by reviewing the areas in which new rules may be proposed, identifying potential problem areas for different types of country, and then assessing the incidence of those problems.

Hence, the next steps are:

- ◆ to undertake primary research to demonstrate the feasibility, desirability and country eligibility for the types of SDT being proposed in the ‘old areas’ of trade policy (e.g. for a ‘Development Box’ or a ‘Food Security Box’ in the AoA);
- ◆ to develop appropriate methodologies for assessing SDT eligibility and format in relation to those ‘new trade’ policies likely to advance furthest in the Doha Round; and
- ◆ following from this, to undertake primary research to elaborate specific proposals for actionable, relevant SDT in new issues in time to feed in to the Doha Round.

Dissemination

The ‘outputs’ from the project are twofold. First, through writing, discussion meetings, and presentations, the project has sought to influence the *current* debate on SDT in the Doha Round. Second, it has focused attention on key areas in which it is not yet possible to identify with sufficient precision the nature of any interests shared by DCs and the types of SDT that these would justify. This should form the foundation for more focused research designed to provide policy-relevant results before the final stages of the Doha Round.

IDS convened a two-day workshop of relevant officials, academics and non-governmental organisation researchers on 27–8 May 2002. The papers presented to the workshop will form the core of a special issue of the *IDS Bulletin* in 2003.

Christopher Stevens has also produced an *IDS Working Paper* (IDS 2002).

In addition, Christopher Stevens has made presentations arising from his research in various fora. These included conferences for WTO representatives in Geneva organised by the FAO

(on 1 March 2002) and by the World Bank and the Graduate Institute for International Studies (on 27 June 2002), together with an expert consultation organised by FAO in Rome on 11–12 July 2002.

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