

## 1 Introduction

The World Trade Organization (WTO) declaration launching the current multilateral trade negotiations, styled by some as the Doha *Development* Round, put developing country interests and the concept of special and differential treatment (SDT) at its core. Paragraph 2 of the Declaration pointed out that the majority of WTO members are developing countries and that 'their needs and interests [are] at the heart of the Work Programme adopted in this Declaration' (WTO 2001). Paragraph 44 reaffirms that:

provisions for special and differential treatment are an integral part of the WTO Agreements. ... 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 (WTO 2001: para. 44).

Yet the discussions on SDT are at an impasse. As Claire Melamed explains (this volume), there has been virtually no progress in the WTO Committee on Trade and Development (CTD) which has been charged with this review. It is only a modest exaggeration to say that WTO members are still at first base. The industrialised countries are willing to offer only token gestures, such as a monitoring mechanism for *existing* SDT. Developing countries are demanding the unattainable: binding commitments on the industrialised countries to provide substantial positive support and to remove all barriers to developing country exports, coupled with full exemption for themselves from any commitment to do anything.

To an extent, this absence of progress simply mirrors what is happening in the other working groups. At the time of writing, movement on all the main items of the Doha agenda has been glacial, at best. The Doha timetable foresees agreement being reached by 2005, but no recent Round has ended on time.

The Tokyo Round was launched in 1973 with the stated expectation of completion in 27 months; it took over 6 years. The Uruguay Round was launched with the confident prediction that it would be concluded within 4 years; it was finalised at Marrakesh in 1994, having taken 'over four years to prepare, and seven more years to complete' (Croome 1995: 1). On these precedents, the Doha

# If One Size Doesn't Fit All, What Does?

## *Rethinking Special and Differential Treatment in the World Trade Organization*

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IDS Bulletin Vol 34 No 2 2003

Round will be with us for the rest of the decade, making slow and erratic progress.

But the problems on SDT are more than “business as usual”. The acronym is simply a handle for efforts to recast the multilateral trade regulatory system to cope with crucially important changes between the WTO and its predecessor, the General Agreement on Tariffs and Trade (GATT), and with the much higher level of developing country involvement.

### 1.1 The centrality of special and differential treatment

This volume of the *IDS Bulletin* is a contribution to the process. It provides concrete examples of the ways in which WTO rules need to be framed from the outset with the circumstances of developing countries very much in mind. Development needs should not be dealt with as an *ex post* “bolt on” after the principal architectural features of the regime have been established.

If this is to be achieved, the SDT framework in the WTO must evolve substantially. There is a place for very specific provisions within the separate agreements that make up the WTO texts (as well as in the country schedules that implement whatever is agreed), but there is also a role for broader, WTO-wide statements of principle and mechanisms. The two are linked, of course: the principles must provide a framework for agreement-specific differentiation and must, in turn, be informed by the specific needs of different groups of developing countries as identified by the detailed negotiations. The *Bulletin* provides guidance at both levels.

One clear reason why there is a need for general principles is that the WTO negotiating process is not one that is designed to throw up automatically development friendly results, and nor does it do so in practice. Negotiations in the GATT were typically hard-nosed, with negotiators following very narrow, mercantilist agendas. The evidence from the WTO is that this has not changed. What has changed are the complexity of the issues being negotiated and the impact of what is agreed.

The innovation of the WTO to make dispute settlement binding increased the stakes enormously: agreements reached in haste have

come back to haunt their signatories. The move away from relatively simple border measures like tariffs and quotas towards behind-the-border policies, where the reverberations of multilateral rules may be far from clear, has made it very difficult even for middle-income developing countries to be confident that they understand fully and accept what their trade partners request.

### 1.2 The shadow of trade-related intellectual property rights

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is the spectre at the feast. Hailed by many at the time of Marrakesh as both modest and desirable, the agreement has long been criticised by trade economists such as Jagdish Bhagwati, whose multilateral credentials are impeccable, as ‘turning the WTO, thanks to powerful lobbies, into a royalty-collection agency’ (letter to the *Financial Times*, 20 February 2001). By 2000, the United Kingdom’s (UK) Performance and Innovation Unit (PIU), in a report on trade policy with a foreword by Tony Blair, admitted that:

it is at least arguable that the TRIPS agreement is tilted in favour of the producers of patented products (most of which are in the developed world) to the disadvantage of developing countries in need of access to medicines and technology for health purposes (PIU 2000: para. 8.28).

The international Commission on Intellectual Property Rights (CIPR), established by Clare Short with a secretariat staffed mainly by officials drawn from the UK Department for International Development (DFID), has gone much further. Its final report argues that:

the interests of developing countries are best served by tailoring their intellectual property regimes to their particular economic and social circumstances. ... A crucial question, however, is how this objective can be accommodated within the complex international architecture of multilateral, regional and bilateral [intellectual property] rules and standards which impose unprecedented limits on the freedom of countries to act as they see fit in this field (CIPR 2002: 155).

The TRIPS agreement has much wider relevance than just intellectual property (IP). Its negotiation, terms (especially regarding transition periods), implementation, and subsequent review provide a stark example of the development dangers posed by international trade negotiations (including, but not exclusively, in the WTO), which in turn represents the challenge that SDT must meet.

The important lesson concerning the negotiation of TRIPs is that it exists: it was accepted by developing countries, and not all this acceptance was of the tacit variety. Major players like India and Brazil engaged actively. Their reasons for accepting the final outcome were complex, partly reflecting expectations about gains from other parts of the Uruguay Round and partly domestic considerations on intellectual property rights (IPRs). Whatever the reason, the existence of a large developing country contingent including some heavyweights failed to prevent rules being introduced, the development implications of which are now being questioned.

The lesson about transition periods and other implementation modalities is that traditional approaches to SDT are woefully inadequate as a means for alleviating development costs. In the GATT/WTO tradition, TRIPs provides extended implementation periods for developing and least developed countries. These provided, with effect from 1 January 1995, a delay in implementation of 1 year for all countries, 5 years for developing countries (extendable to 10 years for technology sectors where no previous IP protection was accorded), and 11 years for least developed countries (extendable on request to the WTO Council). These periods were plucked out of thin air and, in many cases, are wholly inappropriate. The CIPR conclude that:

we are not persuaded by the arguments that developing countries at very different stages of development should be required to adopt a specific date ... when they will provide the TRIPS standards of protection within their domestic IP regimes, regardless of their progress in creating a viable technological base (CIPR 2002: 161).

Another aspect of SDT was that various flexibilities were granted to developing countries and least developed countries in their IP legislation, not least in respect of public health and plant protection.

But such flexibility is of little value if it is not incorporated into legislation, and such incorporation is feasible only in countries with the appropriate technical knowledge. In reviewing the IP legislation in some 70 developing and least developed countries, the CIPR found that:

only around a quarter of these countries specifically excluded plants and animals from patent protection, less than half provided for international exhaustion of patent rights and less than a fifth specifically provided a so-called “Bolar” exception to patent rights (CIPR 2002: 160).

This is despite the fact that TRIPs allows for all of these. Among the possible reasons suggested is that domestic legislators were unaware of the flexibility options, while the bodies like the World Intellectual Property Organisation (WIPO) providing technical assistance to the legislative process chose not to suggest them.

At the same time, the industrialised countries have been active in using dispute settlement to enforce TRIPs. Some 24 cases involving TRIPs have been brought to dispute settlement, seven of them by developed against developing countries and only one by a developing against a developed country (CIPR 2002: 3).

The final lesson of TRIPs is that once WTO agreements have been signed, whatever imperfections are subsequently discovered, they are virtually impossible to revise. It is for this reason that the CIPR recognises that:

While we have reservations about the extension of TRIPS standards to all developing countries, we recognise that it is most unlikely that any WTO members would be keen to renegotiate the agreement. Many members fear that in seeking particular amendments they would be obliged to compromise elsewhere in ways that may not bring a net benefit to them (CIPR 2002: 160).

This pessimism is borne out by the history, described by Claire Melamed in this volume, of developing and least developed country attempts to take action under the Uruguay Round provisions that permit them to request further extensions. The

industrialised countries have shown a considerable unwillingness to agree generalised extensions.

## 2 What is special and differential treatment?

The question posed in the heading may seem an odd one: SDT has been a recognised concept since the early days of the United Nations Conference on Trade and Development (UNCTAD), and is the focus of one of the Doha working groups. But it is a relevant one because the provisions conventionally clustered under the acronym do not represent the full range of possibilities. On the one hand, “special and differential treatment”, in its literal sense, has had much broader application than via the measures conventionally described as “SDT”. On the other hand, there are methods for protecting development interests in future negotiations that do not involve formal SDT. In other words, “SDT” is only a part of the picture.

### 2.1 The effects of binding dispute settlement

Scope for special differentiation applied widely in the GATT 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. Such vagueness included such current *causes célèbres* as the Article XXIV requirements that a free trade agreement/customs union should cover ‘substantially all trade’ and be completed ‘within a reasonable period of time’. This allowed countries with different views of what should be done to sign up to the same set of words, secure in the knowledge that they could apply them in their chosen way “once the ink was dry”.

The innovation of the Uruguay Round to make dispute settlement binding 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 United States (US) offshore tax regime and the European Union (EU) banana regime, for example, has concentrated minds. In neither case was the defendant wilfully flouting WTO rules: both believed that, on their interpretation of the rules, they had a strong defence.

There are three reasons why this sea change from the GATT to the WTO needs to be borne constantly in mind. The first is that proponents of SDT are not necessarily pressing for loopholes to be inserted into a well-established system based upon uniform treatment. On the contrary: the GATT provided a highly permissive framework. The exemptions for temperate agriculture and the Multifibre Arrangement’s quantitative restrictions on developing country textile and clothing exports represented only the most visible signs that “non-discrimination” remained a goal and not an achievement.

To the extent that multilateral trade rules have provided an effective “one size fits all” regime, it is only since 1994 and, as Constantine Michalopoulos (this volume) explains in relation to agriculture, substantial exceptions still exist. Hence, the proponents of SDT are arguing merely for the reality, rather than the rhetoric, of the WTO to apply, and to recognise that binding dispute settlement requires that this be done *ex ante* rather than *ex post*.

The second implication of change is that binding dispute settlement has altered the character of the WTO and its image. The WTO appears to be a more litigious forum than was the GATT. All sorts of policies that had been in existence for years have been placed in the WTO’s dispute settlement spotlight. And the proportion of cases brought by industrial against developing countries has increased: a review of cases brought between 1995 and 2000 found a three-fold increase compared with the GATT period in the proportion of cases that were brought by industrialised countries against developing countries (Delich 2002: 76).

A corollary is the vastly more controversial image of the WTO compared with the GATT. Rollo and Winters argue that:

environmental and social groups wish to ensure that WTO law does not block their preferred domestic policies ... [and] these groups also wish to co-opt the WTO dispute settlement procedure, with its apparently powerful sanctions, to enforce their preferred policies elsewhere (Rollo and Winters 2000: 567).

Taken together, these two effects of what Rollo and Winters call ‘The WTO’s apparently uniquely

effective enforcement mechanism' (Rollo and Winters 2000: 569) have altered the character of the Doha Round compared with the Uruguay Round and its predecessors. Arguably this has reduced the usefulness of the WTO as a forum within which to discuss the relative desirability of alternative strategies for development (or industrialised country prosperity).

Always the participants' eyes must be on the rules that emerge and how to avoid unintended effects. Domestic law on racial or gender discrimination cannot force citizens to become tolerant, but only prevent overt acts that cause measurable harm to others. Therefore, it could be argued, the WTO is not a forum in which to debate the relative developmental merits of, e.g. India's policies on agricultural subsidies, but only to prevent these policies causing damage to other countries.

The third consideration is that if binding dispute settlement is part of the problem, its absence could be part of the solution. The WTO texts already contain many provisions that are not subject to dispute settlement. As explained below, and in the articles by Claire Melamed and Constantine Michalopoulos (in this volume), many of these relate to SDT, and their lack of enforceability has contributed to developing country bitterness with the WTO.

There is no reason of principle why contentious issues, if they are to be covered by the WTO, should not be defused by making the provisions non-actionable. In other words, a WTO member that believed another member to be failing to honour the provision would not have the right to take the case to the WTO's dispute settlement procedures and, ultimately, impose trade sanctions to enforce the verdict.

Rollo and Winters (2000) have proposed just such an approach in relation to environmental and labour standards. Their "first best" outcome would be for these issues not to be brought within the WTO's purview. But, failing that, they argue:

The GATT's traditional enforcement mechanism of allowing individual members to act against imports from another member held to be in violation of some norm is too intrusive

and subject to abuse to be trusted in cases where such deep issues of sovereignty and taste are at stake (Rollo and Winters 2000: 562).

## 2.2 Alternatives to "special and differential treatment"

Formal "SDT" in the sense currently used in the WTO does not provide the only avenue for avoiding developmentally undesirable outcomes from multilateral rules. The term is used principally to describe flexibilities built in to the rules that answer to the perceived needs of particular countries. One alternative approach is, as indicated, to remove a rule from the scope of dispute settlement. This would allow a single, standard provision to be interpreted in multiple ways.

Another option is to adopt what is called a "positive-list approach". A third is to return to the concept of limited membership, or plurilateral, agreements that proliferated under the Tokyo Round Agreement and still exist (e.g. in the Agreement on Government Procurement (GPA) analysed by Giovanna Fenster (this volume). In some cases these options may prove to be the only feasible way forward, but they have disadvantages compared with "SDT", which should be noted.

The normal GATT/WTO approach to negotiations has been to seek rules that apply to all except where specific exceptions and caveats have been agreed. The approach to the negotiation of large parts of the General Agreement on Trade in Services (GATS) was completely the reverse: each country was allowed to specify precisely the areas and types of rule it was willing to accept, and is not committed to anything not so specified (subject to a general framework of concepts and principles negotiated in the conventional fashion). This positive-list approach would allow developing countries in principle to deal with the problem that they cannot assess all possible ramifications of all the negotiating proposals. The positive-list approach would allow them to accept only those commitments the implications of which they had been able to assess.

There are at least three disadvantages of the approach that *could* be dealt with by SDT, in the technical sense that one could devise differential rules that would address the problems. Whether or

not this is politically feasible is another matter; the only point being made here is that if SDT does deal with the problems, then it would be a superior solution to the positive-list approach.

One problem is that some of the less well-resourced developing and least developed countries may not even be aware of the extent of their lack of knowledge. The CIPR finding that a high proportion of the countries they studied had failed to take account of TRIPs flexibility illustrates the problem, as does the apparent failure of sources of technical assistance to incorporate such flexibilities in the legislative models they supplied. With an SDT approach incorporating differentiation into the rules, the weaker countries are able to rely upon the stronger developing countries to advance their cause (at least to the extent that their interests overlap). This clearly does not “solve” the problem: the TRIPs failings apply to a “traditional SDT” not a positive-list approach, but the dangers are more limited. It would be possible, for example, for some of the countries identified by the CIPR subsequently to amend their legislation to take advantage of the flexibilities that, thanks to other WTO members, exist within the TRIPs agreement.

A second problem is that it is wholly negative: it relieves some members of making some commitments; it does nothing to require other members to assist. A complaint about much current SDT is that it provides too little positive support. But at least SDT *could* be framed in such a way as to provide incentives for industrialised countries to provide positive support (as is explained in the final article in this *Bulletin*). And the existence of general rules that apply with full vigour to industrialised countries provides some constraint on their negative actions.

Third, the extension of the positive-list approach would sap the overall vitality of the multilateral regulatory framework. To the extent that they are sensible, treat equals equally and unequals unequally, common rules are “a good thing”. They are transparent and provide certainty. As Giovanna Fenster shows with respect to the GPA (this volume), a substantial amount of homework must be done when a positive list has been applied to determine whether or not its provisions apply to any given contract.

The GPA is an example of a plurilateral agreement, which provides another route to deal with developing country concerns. If some developing and least developed countries are unwilling to agree rules in a certain area, why not allow those members that are willing to press ahead? A plurilateral agreement is one in which only those members that have signed up have an obligation to incorporate the agreed rules in their own legislation or the right to benefit from the rules applied by other members.

The main disadvantage of the plurilateral as opposed to the SDT approach is that those countries not willing to join have no standing in the negotiation of the rules. As both Peter Holmes and Giovanna Fenster (this volume) make clear in relation to competition and government procurement respectively, much of the interest in the potential first rounds of negotiations lies in the precedents that they may set for future, more powerful rules. If the foundations for future new rules are laid only by industrialised countries, the prospects that they will support a structure that is pro-developmental are less good than if they are negotiated from the outset by all interests.

### 3 The *status quo* on special and differential treatment

Even though “SDT” is not the whole story, it is at the centre of current discussion; and of this *Bulletin*. Its history has been well covered (for example, by Michalopoulos 2001; Whalley 1999; Fukasaku 2000). In essence, it is that:

- SDT had its origins in a view of trade and development that questioned the desirability of developing countries liberalising border measures at the same pace as industrialised countries.
- The popularity of this approach was (possibly temporarily) in decline in many developing country governments during the negotiation period for the Uruguay Round Agreement.
- Consequently, many SDT provisions on border measures and subsidies envisage developing countries (other than the least developed) following a similar path to that of the industrialised countries but at a slower pace.

- Other SDT provisions (particularly those covering positive support to developing countries via financial and technical assistance or technology transfer) were not agreed in a form that is enforceable within the WTO system.

The presumption of many was that the Uruguay Round represented the beginning of the end for SDT. Increasingly WTO members would accept the same obligations. But, as suggested above, this presumption appears now to have been misplaced. What is clear, though, is that the SDT incorporated into the Uruguay Round texts is unsatisfactory for many members and observers.

### 3.1 Types of special and differential treatment

There are currently three areas of SDT, and they apply to three principal groups of countries. The types of treatment are modulation of commitments, trade preferences and declarations of support, while the main country groups are the industrialised countries, the developing countries and the least developed.

#### Modulation of commitments

The most substantial SDT provisions are those which allow for a modulation of commitments by different type of member. Hence, for example, the Agreement on Agriculture requires the industrialised countries to reduce their tariffs by 36 per cent over 6 years, but developing countries have to do so by only 24 per cent over 10 years and least developed countries do not need to cut their tariffs at all. As noted above, TRIPs provides similarly extended timetables.

This aspect of SDT is normally “legally enforceable” in the following sense. A WTO member may use the dispensations granted under SDT in its defence if its trade policies are challenged by another WTO member on the grounds that they do not conform with the Uruguay Round commitments. Hence, for example, if India were challenged on the grounds that it had not reduced its agricultural tariffs by 36 per cent, it would have a watertight defence in dispute settlement by pointing to the fact that it is required to liberalise by only 24 per cent.

#### Trade preferences

The second area is the provision of trade preferences (mainly by industrialised countries to developing and least developed countries). Under the 1979 Enabling Clause, WTO members are permitted to suspend the granting of most-favoured-nation (MFN) treatment in cases where they are offering better-than-MFN tariffs to developing countries.

The legal enforceability of these provisions is questionable. A strong case can be made that the Generalised System of Preferences (GSP) of most industrialised countries can be justified under the SDT provisions of the Enabling Clause. In other words, if the EU were to be challenged in dispute settlement by, say, the United States of America (USA) on the grounds that the standard GSP tariff available to all developing countries was lower than the MFN tariff being applied to imports from the USA, the EU would probably be able to cite the SDT provisions of the Enabling Clause in its defence. However, as has been seen in the case of the challenges from Latin America and the USA to the EU banana regime, other aspects of trade preferences are less securely underpinned by legally enforceable SDT. Problems arose in the case of bananas because:

- the differential tariff was challenged on the grounds that it favoured one group of developing countries over another (and, hence, could not be justified under the Enabling Clause);
- the system of import licensing for companies was challenged on the grounds that it contravened the EU’s commitments under the General Agreement on Tariffs (GATS).

#### Ancillary support

The third area of SDT is wholly unenforceable. It comprises the large number of declarations of support for developing countries that litter the Uruguay Round texts. For example, Article 4 of GATS deals with encouraging the increased participation of developing countries in international services trade through ‘negotiated specific commitments’ relating to the strengthening of their domestic services capacity, improvement of their access to distribution channels and liberalisation of market access in sectors and modes of supply of export interest to them. Similarly, the *Decision on Measures Concerning the Possible Negative*

*Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries* requires members to review the level of food aid to ensure that it is sufficient to meet the legitimate needs of developing countries, to adopt guidelines to ensure that an increasing proportion is provided to least developed countries and net food-importing developing countries (NFIDCs) and to give full consideration in their aid programmes to help improve agricultural productivity and infrastructure. There are many other such references.

As is well known, there is no action that an aggrieved developing country can take either inside or outside the WTO to force another member (or an international organisation) to take actions that it believes are consistent with these undertakings. A considerable element of the discontent expressed by developing countries in the WTO about the failures of SDT derives from resentment that they were “hoodwinked” into signing the Single Undertaking through promises that were, literally, not worth the paper they were written on.

### Lessons

What lessons are to be drawn from this review of the *status quo*? There are at least three:

1. SDT provisions are worthwhile only if they are enforceable in some fashion that is relevant to the situation to which they respond.
2. This lesson has not been lost upon developing countries, and so the tactic used during the final stages of the Uruguay Round to bring everyone on board (of offering unenforceable ancillary support) will probably not work at the end of the Doha Round.
3. The WTO has no internal mechanism to adjudicate on membership of state groups to which legally enforceable SDT applies. The least developed country group is a United Nations (UN) category that WTO members have chosen to accept as a basis for special treatment and, while NFIDC membership requires a state to fulfil certain criteria, these are minimal.<sup>1</sup> All other categories are self-selecting: each member indicates whether it considers itself to be an industrialised or a developing country (or NFIDC).

## 3.2 Problems with the *status quo*

There are two principal problems with the *status quo*. One is that the existing, legally enforceable provisions are eroding assets. The other is that large areas of “new” trade policy are without any legally enforceable SDT.

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 TRIPs and the Agreement on Agriculture cease to provide differential treatment once the extended timetable has expired. Similarly, SDT provisions that require developing countries to liberalise/reduce subsidies, etc., but to a lesser extent than industrialised countries, will in due course cease to have validity when the developing countries’ remaining barriers reach very low levels.

It is true that in cases where least developed countries have been exempted from tariff/subsidy reduction altogether their concessions will not be eroded in this way. But many vulnerable developing countries do not fall within the least developed 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, as noted above under TRIPs.

## 3.3 The analytical case for special and differential treatment

What are the analytical criteria for SDT? The fundamental criterion 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. Many countries have differential economic

policies to favour peripheral regions or disadvantaged social groups. 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. Hence, the default assumption at the multilateral level should be that one size *does not* fit all.

### **Economic, administrative and political criteria**

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:

1. The interests of each member must not be so different that they require unique treatment.
2. 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.
3. There must be some actionable mechanisms that relate to these shared differences and to the rules that are being proposed.

### **Balancing similarity and difference**

In a sense, every country is different, and each one makes its own, independent commitments during WTO Rounds. These commitments are reflected in its national schedules, which apply any general principles that have been agreed to its national trade-related policies. For issues where every country is completely unique, the only way in which difference can be reflected is through variations in agreed commitments in the national schedules.

Achieving differentiation through national schedules however, presents either an infeasibly large negotiating burden or substantial post-agreement risks. For every WTO member to reach agreement with every other one on the precise provisions of its national schedules could not realistically be accomplished within the timespan of a normal set of WTO negotiations. The Uruguay Round tariff schedules of the EU alone run to some 9,500 lines.

Hence, there would be an element (probably a large one) in which states took on trust that each member's national implementation schedules

faithfully reflected the general rules agreed, applying them in a way that was sensitive to the domestic situation. But, without any agreed modulation established in the 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.

### **Identifying groups**

While 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 Organisation for Economic Cooperation and Development (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.

Constantine Michalopoulos (this volume) reviews the arguments for special provisions in the new Agreement on Agriculture for food insecure states. But how is food insecurity to be identified, and what organisation is to judge whether or not a country is, or is not, food insecure? Should exemptions apply to the whole of a state's agricultural sector, to poor farmers, or to all poor people regardless of their occupation?

Unless such practical issues can be overcome, the scope for highly nuanced SDT is limited. But such differentiation will affect developing and least developed countries in different ways. The article on food security classifications provides an illustration. Most countries' initial positions will be that they want a definition of food security SDT that suits their particular circumstances, leading to general phrases or long lists of actionable features.

Yet the more imprecisely defined or all-embracing the characteristics of entitlement, the more bland the agreed SDT is likely to be. For example, it is possible that WTO members would agree to very substantial SDT within the Agreement on Agriculture in relation to market access and domestic subsidies if it applied only to very poor states with sickly agricultural sectors. But it is

implausible to expect them to do so if it were available to all developing countries, since it would then apply equally to Cairns Group members.

This point is discussed by Claire Melamed (in this volume). She argues that developing countries are aware that the “price” of significant SDT will be greater differentiation, but they see no purpose in tackling such a thorny political issue in the absence of any evidence that the industrialised countries are willing to offer “significant SDT”. This is a log jam that will have to be broken if the Doha Round is to proceed. Until it is, the role of research is to establish an understanding of relevant criteria, appropriate remedies, and the country membership of alternative groupings.

### **Modulations**

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.

To continue with the Agreement on Agriculture example, in what sense should most food insecure states be treated differently in relation to market access liberalisation or the provisions on domestic subsidies than other states? Answers to such questions spring easily to mind in relation to the Agreement on Agriculture because the agenda is familiar (tariff cuts, subsidy reductions, etc.).

But what if the same question were asked of proposed new rules on competition policy? There are at least two sets of problems. 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)? Just as battle lines were drawn in the past between opponents of sharp liberalisation by developing countries and those arguing that the poorer the state the more it stood to gain, so there will probably be dispute over whether or not poor countries stand to gain more rather than less than rich ones from transparent government procurement open to all suppliers.

The second set of problems 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. Here the argument may be over the relative merits of modulating commitments as opposed to providing support to facilitate compliance. The issues are taken up again in the final article of the *Bulletin*.

### **The contribution of the *Bulletin***

The extent to which a contribution can be made to the resolution of these questions depends upon the progress that has been made in defining the issues. Where WTO rules already exist, it is feasible in principle to identify precisely what needs to be done. In practice, as Claire Melamed shows (this volume), the discussions in the CTD have often lacked precision. But she argues that the major problem is less the limited availability of compelling evidence on the changes that need to be made than an unwillingness by industrialised countries to reopen existing texts except in the context of negotiations on new rules.

In cases like competition policy and government procurement, the issue is not to design precise modulation, which is impossible until there exists more clarity on what multilateral rules might be seriously discussed. Giovanna Fenster (this volume) shows, in relation to government procurement, that mutually contradictory messages are emanating from different parts of the Geneva-based system. Peter Holmes (this volume) explains how there exist two very different concepts of what an international competition policy might achieve. While these are not mutually incompatible, opinion has tended to polarise with some active industrialised countries focusing on one, and active developing countries on the other.

For the present, therefore, the task of research is to clarify the issues, to show the ways in which multilateral policies might impact on development, and to provide initial indications of the potentially positive and negative features of any regime. If negotiations progress, this sensitisation research will allow an initial assessment to be made of the potential development effects of any proposals that eventually emerge, and will provide the

foundations for the more precise research that will then be possible.

Agriculture falls between these two extremes. A text exists, but it is largely non-constraining. The outcomes of the current negotiations cannot be known, but there are some good pointers to the range of rule changes that might be agreed. Constantine Michalopoulos (this volume) assesses the development implications of the current regime and analyses the merits of alternative means to deal with some of the more widely expected changes. And following that, Christopher Stevens and Jane Kennan provide an introduction to the task of classifying countries once the extent of any change becomes more clear.

Where do we go from here? The initial GATT dealt with a relatively simple agenda and was highly

successful. The WTO built on this success and on the enormous increase in the complexity of global commerce, to extend its portfolio into more tricky areas. For a simple agenda, simple differentiation may suffice. More complex agendas require a similar evolution in the approach to differentiation.

Much remains unknown about the nature of the new rules that will be discussed seriously. The precise implications of those rules cannot be assessed until their form has become clearer. Such an assessment may well take time to complete. In the meantime, a better consensus on an approach to the problem is required. The final article in this *Bulletin* sets out an analytical framework within which new rules should be examined to identify the extent and type of SDT that could be justified.

## Notes

1. To be a member of the NFIDC, group a state must:
  - be a developing country;
  - have been a net importer of basic foodstuffs in any 3 years of the most recent 5-year period for which data are available;

- notify the WTO Committee on Agriculture of its wish to be so classified.

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