

# SPECIAL AND DIFFERENTIAL TREATMENT ISSUES FOR SOUTH ASIA

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## INTRODUCTION

Special and differential treatment (S&DT) provisions for developing and least developed countries form an important part of the World Trade Organisation (WTO) regime. These were born out of a wider realisation by the world trading community that a global economic environment is required in which relatively less developed countries could also compete on equal footing with their developed counterparts. All developing countries are relatively disadvantaged compared to their developed counterparts in terms of resource and capacity. This makes it difficult for them to implement and comply with WTO obligations. South Asia is no exception. S&DT provisions would enable these countries to achieve full integration into the global economy and ensure that benefits of free trade accrue to them.

Even the WTO Preamble recognises the need to undertake efforts to ensure that developing countries, particularly least developed countries (LDCs), improve their share in international trade commensurate with the needs of their economic development. The spirit of the Preamble was given a concrete shape by incorporating S&DT provisions into various WTO agreements. Part IV of General Agreement on Tariffs and Trade (GATT) exclusively sets out S&DT provisions for developing countries. Ministers during the Doha Ministerial had also reaffirmed that 'provisions for S&DT are an integral part of the WTO Agreement'.

The developed countries, however, have not been able to come to forego what they perceive as their commercial and political interests to turn the Doha mandate into reality. This briefing paper is an attempt to bring to fore the issues relating to S&DT. It touches the intrigues that have gone in the WTO since the inception of the concept of S&DT as developed countries have been trying to manipulate the S&DT agenda to assure that developing countries pay the highest possible price for whatever is finally agreed. This paper aims at provoking debate on how S&DT provisions could be made meaningful for developing countries in general and South Asia in particular. The paper makes an argument that unless S&DT provisions are followed in the true spirit in which they were included within the ambit of the WTO, true benefits of liberalisation and globalisation would not accrue to developing countries.

## S&DT in GATT/WTO

S&DT is not a new concept. It existed even before the Uruguay Round (UR) of negotiations began (See Table: 1). In the early years of the GATT, the focus was essentially on reciprocal tariff negotiations, where developing countries had little to give. The GATT had little to offer in terms of making trade a means to be used by the international community to promote development in developing countries. This belief existed due to the fact that its priorities and the secretariat were dominated by the North and the needs of the emerging developing world were a little more than an afterthought and hardly addressed.

In the early 1960s, as a result of the pressure from United Nations Conference on Trade and Development (UNCTAD) and G-77<sup>1</sup>, a new element was introduced in the GATT in Part IV. The addition of Part IV containing the

'development dimension' in the GATT opened doors for preferential treatment in favour of developing countries. It provided some flexibilities to the strict reciprocity conditions of the GATT. However, despite S&DT, the early rounds of trade negotiations did little to benefit developing countries.

It was in 1968 that an important non-reciprocal trade preference in the name of Generalised System of Preferences (GSP) was established. Next, the Enabling Clause of 1979 formally established the principles of differential and more favourable treatment. The Enabling Clause gave a stronger legal basis for S&DT within the multilateral trading framework. Even the WTO Preamble gave due recognition to the concept of S&DT. At present, a total of 145 S&DT provisions can be found in various WTO agreements, which have been classified by the WTO Secretariat into seven broad categories (See Box: 1).

# BRIEFING PAPER

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**TABLE: 1**

**S&DT IN MULTILATERAL TRADING REGIME: PRE-URUGUAY ROUND**

Key Elements of S&DT and Focus		Justification and Rationale
GATT 1947	No S&DT, equal treatment, Article XVII	Fundamentally no difference: 11 out of 23 members developing countries
1948-55	Developing countries as equal partners request under Article XVIII reviewed by working parties	1947-48 Havana Conference: challenges trade liberalisation and link to growth/development
1954-55	Article XVIII only for LDC right to protect Section A: flexible tariff structure to promote particular industry Section B: quantitative restriction for balance of payment (BoP) Section C: tariffs and quantitative restrictions to support infant industry	Need to improve terms of trade; reduce dependence on primary commodities; correct instabilities from balance of payments; industrialisation through infant industry strategy and/or export promotion through export strategies through export subsidies
1964	Part IV on Trade and Development in GATT introduced Article XXXVI: favourable market access for product of export interest of developing countries on non-reciprocity basis Article XXXVII: elimination of restriction between primary and processed products, taking account of trade policy instruments on developing countries Article XXXVIII: international arrangement to improve market access for products of export interest to developing countries	Part IV guidelines for preferential treatment for developing countries; flexibility, nonreciprocity, commodity stabilisation, but did not result in any action.  Dissatisfaction with GATT, led to first UNCTAD and created Group of 77 as vehicle for developing countries to pursue trade agenda addressing their concerns.
1968-71	GATT waiver from most favoured nation (MFN) obligations in 1971 and for developing country members to grant preference among themselves.	Establishment of GSP
Tokyo Round 1979	Enabling Clause establishes the principles: <ul style="list-style-type: none"> <li>• Preferential market access for developing countries on nonreciprocal and non-discriminating basis</li> <li>• More favourable treatment in other GATT rules dealing with non-tariff barriers (NTBs)</li> <li>• Preferential trade between developing countries</li> <li>• Special treatment for least developed countries</li> </ul> S&DT provisions embodied in codes Relaxation of Article XVIII disciplines	Legal basis for S&DT but applied in discretionary way; but allowed GSP and other trade preference schemes to be applied on permanent basis, with discretion on extent of preference and level of reciprocity at discretion of each country  Very few developing countries signed up  Introduced concept of graduation of developing countries whereby preference and non-reciprocal market access phase out

Source: Pandey, 2003.

**POLITICAL ECONOMY OF S&DT**

A host of reasons such as the lack of skilled personnel and high cost of maintaining a separate delegation to deal with trade matters had restricted the participation of developing countries, including most South Asian countries, in the UR process and negotiations. This disadvantage resulted in major disparities in bargaining power between developed and developing countries. While the principle of S&DT for developing countries has been accepted and a number of related steps taken, trade and trade related negotiations, however, still seem to start from the premise that the same rules should apply to all.

Besides, some developed countries, in spite of accepting the principle of S&DT, have doubted its value in certain areas, tried to narrow its scope, criticised it on theoretical grounds, and indeed, have exerted pressures on developing countries involved in accession negotiations to forgo some of the benefits accorded to developing countries that are already members of the WTO. It can be argued that in practice, the outcomes of both the UR and the Doha Round of trade negotiations have been in favour of developed countries, thereby creating several imbalances in the WTO system.

- In some cases, S&DT appeared to compensate developing countries for perceived shortcomings in other negotiated agreements. Ideally, shortcoming should be addressed directly in the agreement itself, but this may not be possible or easily achievable in practice. Developing countries are aware that their continuing relative weakness, both due to their relative underdevelopment and fragmented participation, has led to the evolution of a kind of multilateral trading system that often operates to their disadvantage. Thus, for developing countries, S&DT constitutes an integral part of the WTO agreements that balances their rights and obligations.
- The importance of S&DT stems from the fact that many developing countries would find it extremely difficult to accept strict disciplines and higher liberalisation commitments or even join new negotiations. S&DT should give them more flexibility and discretion in the use of public policies to enhance their prospects for industrialisation, diversification of production and exports, export promotion and overall growth and development.
- But what plagues the S&DT provisions within the WTO structure is the general lack of enforceability. Only a handful of S&DT provisions are legally enforceable. Depending upon the

## BOX: 1

### THE UNIVERSE AND CLASSIFICATION OF S&DT UNDER THE WTO REGIME

The universe of S&DT consists of 145 provisions spread across the Multi-lateral Agreements on Trade in Goods; the General Agreement on Trade in Services (GATS); the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS); the understanding on rules and procedures Governing the Settlement of Disputes and various Ministerial Decisions. Of the 145 provisions, 107 were adopted at the conclusion of the UR, and 22 apply to LDC members only. The WTO Secretariat has broadly classified S&DT provisions as follows.

- provisions that recognise the right of developing country governments to take measures to assist their domestic industries, and provisions requiring developing and least developed countries to undertake only such commitments or obligations that 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.
- flexibility in procedures concerning the enforcement of the rights of, or complaints/disputes brought against or requirements on developing and least developed countries, such as the special procedures under the Subsidies and Antidumping Agreements.
- waivers for collective efforts among developing countries to accord preferential treatment to one another or in the extension of special measures by developed countries to provide preferential market access for products from developing and least-developed countries, such as Part IV of GATT 1994 and the Enabling Clause.
- 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.
- provisions for technical assistance to developing and least developed countries.
- 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 LDCs in mandatory terms or under binding provisions.

Source: [www.wto.org](http://www.wto.org)

enforceability, there are three forms of S&DT in the WTO: modulation of commitments, trade preferences and declarations of support<sup>2</sup>.

**Modulation of commitments:** The most substantial S&DT provisions are those that allow for a modulation of commitments by different types of members. This form of S&DT is legally enforceable in the sense that a WTO member may use the dispensations granted under S&DT in its defense if its trade policies are challenged by another WTO member on the grounds that they do not conform with the UR commitments.

**Trade preferences:** The second area is the provision of trade preferences (mainly by developed countries to developing and least developed countries). Under the 1979 GATT Enabling Clause, WTO members are permitted to grant tariff preferences to developing countries and LDCs without having to grant the same treatment to developed countries. However, the legal enforceability of these provisions is questionable.

**Declarations of support:** The third area of S&DT is wholly unenforceable. It comprises a large number of declarations of support for developing countries and LDCs that litter the UR texts. There is no action that an aggrieved developing country or LDC can take, either inside or outside the WTO to force another member to act on these undertakings.

### S&DT IN THE DOHA MANDATE

Paragraph 44 of the Doha Declaration reaffirmed that 'provisions for S&DT are an integral part of the WTO Agreements'. Trade ministers at Doha directed that all S&DT provisions 'shall be reviewed with a view to strengthening them and making them more precise, effective and operational'<sup>3</sup>. Ministers endorsed the work programme on S&DT set out in the Decision on Implementation Related Issues and Concerns. They also agreed that the WTO Committee on Trade and Development (CTD) should carry out S&DT review. The task of CTD was divided into six components as given below.

- to identify mandatory and non-mandatory S&DT provisions in the existing agreements (by early December 2001);
- to consider the legal and practical implications for developed and developing countries of converting non-mandatory S&DT into mandatory provisions (giving factual information on the legal implications by February 2002);
- to identify those non-mandatory provisions that members think should be made mandatory (by March 2002, on the basis of inputs received from members in February 2002);
- to examine ways in which S&DT provisions can be made more effective (by July 2002, after considering proposals and drafting recommendations);
- to consider ways for assisting developing countries to best utilise S&DT provisions (by July 2002, after considering proposals and drafting recommendations); and
- To consider how S&DT may be incorporated into the architecture of the WTO rules<sup>4</sup> (by July 2002, after considering proposals and drafting recommendations).

July 2002 was the deadline set for CTD to report to the General Council (GC) with 'clear recommendations for a decision' on the review of S&DT provisions. The July deadline was not met and even the next deadline of 31 December 2002 was missed. Members were unable to arrive at a consensus on any recommendations for a decision, prompting the Chair to the GC remarking, 'All efforts to find a common ground to members' differences has been unsuccessful'. A new deadline was yet again set for 10 February 2003.

On 10 February 2003, CTD, by consensus, adopted a report, recommending the GC to provide clarification, on the Doha mandate on S&DT. The GC, which met the same day, failed to adopt that report. Subsequently, no progress could be made even during the Cancun Ministerial and talks stalled.

The GC on 31 July 2004, however, yet again reiterated that provisions on S&DT are an integral part of the WTO agreements. The Council instructed CTD to expeditiously complete

the review of all outstanding agreement-specific proposals and report to the GC with clear recommendations for a decision by July 2005. The Council further instructed CTD, within the parameters of the Doha mandate, to address all other outstanding work, including the cross-cutting issues, the monitoring mechanism and the incorporation of S&DT into the architecture of WTO rules.

## PERSPECTIVES OF THE SOUTH

Developing countries, including countries in South Asia, have been trying to secure a better deal from the multilateral system. They have made a number of S&DT related submissions to the WTO. One major concern that is evident from these submissions is that developed countries have largely failed to respect and act on the promises for S&DT that they earlier made. Developing countries want such promises to translate into action.

Developing countries and LDCs have in total submitted 88 proposals<sup>5</sup> on S&DT. Most proposals came from the African Group and the group of LDCs. Most proposals identify parts of an agreement and suggest new wording to introduce new provisions for developing countries or to strengthen existing S&DT provisions.

In April 2003, the GC chairperson sub-divided the 88 proposals into three distinct categories. Category I, with 38 proposals, contains those likely to be accepted with minor changes. It includes 12 proposals that members had agreed in February. Category II contains 38 proposals, which according to the chairperson would be discussed more effectively in the relevant WTO bodies. Accordingly, he forwarded them to the relevant bodies. Category III contains 12 proposals that require major changes in order to be agreed upon. Proposals in the first and third categories remain on the GC's agenda.

The Council on 31 July 2004 instructed all WTO bodies to expeditiously complete the consideration of proposals in Cat-

egory II and report to the GC, with clear recommendations for a decision, as soon as possible and no later than July 2005.

From the South Asian region, only three countries have been active in making any submissions relating to S&DT. India in one of its individual proposals had referred to amendments in Article 10.2 of the Agreement on the Application of Sanitary and Phytosanitary (SPS) Measures and Article 4.10 of 'Understanding on Rules and Procedures Governing the Settlement of Disputes' to convert some non-mandatory S&DT provisions into mandatory provisions.

One of the most important proposals made to the WTO with regards to S&DT was the one submitted by a group of developing countries<sup>6</sup>, including some South Asian countries, before the Doha Ministerial (See Box: 2). The proposal had been submitted in the hope that it would be considered in the preparations for the Doha Ministerial for a framework agreement on S&DT<sup>7</sup>. The proposal discussed the history of S&DT in GATT 1947, setting out the milestones and progress made and how the WTO eroded this progress (See Box: 3). It made important recommendations to undertake a thorough review of the concept of S&DT. The developing countries' proposal dated 19 September 2001 went on to sketch some elements of such a framework agreement as follows:

- S&DT 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).
- Any agreement that members may negotiate or agree to shall have 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 of 2000).
- Members shall undertake an evaluation of the implications of any future agreement, with respect to imple-

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## JOINT COMMUNICATION FROM DEVELOPING COUNTRIES

### I. Understanding on Rules and Procedures Governing the Settlement of Disputes

Article 12.10 of the Understanding on Rules and Procedures Governing the Settlement of Disputes has several parts. The first part speaks about extension of consultation period to developing countries on panel proceedings by the parties themselves or by the dispute settlement body's Chair. The next part directs the panel to give 'sufficient time' to the developing member to prepare its defence. The last part subjects this grant of time to the overall timeframes set for the dispute settlement proceedings. In this context, besides others suggestions like improvement in the language of the provision, flexibility in the time period, etc., it has been proposed to make the provisions of the dispute settlement understanding effective, operational and value to developing country members.

### II. Agreement on SPS

Article 9.2 of the Agreement on SPS states, among others, that developed country members shall consider providing technical assistance to developing country members and permit them to maintain and expand their market access opportunities. In this context, it is proposed that the clause 'shall consider providing' be changed to 'shall provide' in the Article to make the provision mandatory. It is further proposed to add in the provision that developed country members shall provide developing countries with relevant technology and technical facilities on preferential and non-commercial terms, preferably free of cost, keeping in view the development, financial and trade needs of the exporting developing country.

### III. Agreement on Technical Barriers to Trade

Article 12.3 states that developed members shall take into account the special development, financial and trade needs of developing countries. For effective operationalisation of this Article, suggestion for additions to the existing provision has been proposed and developed countries have been urged to provide relevant technology and technical facilities on preferential and non-commercial terms, preferably free of cost to facilitate the developing countries' exports. This proposal, if accepted, would make S&DT provision meaningful and effective.

Source: [www.wto.org](http://www.wto.org)

## PROPOSAL BY A GROUP OF DEVELOPING COUNTRIES

The proposal in paragraph 7-9 mentions the following S&DT erosions:

1. The concept of S&DT underwent a dramatic transformation during the UR negotiations. S&DT prior to the WTO was in recognition of the special problems faced in development by developing countries, but in the WTO agreements, it only recognised 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:
  - It was assumed that the level of development had no relationship with the level of rights and obligations under the multilateral trading system;
  - The same policies could be applicable for countries at various levels of development. It was thought that short transition periods and technical assistance for developing countries was all what was required; and
  - Developing countries did not have the option to sign, or otherwise, on the various agreements because all of them, except four plurilateral agreements, were part of a Single Undertaking.
2. This dramatic erosion of S&DT was further compounded by the fact that the WTO agreements were enforceable through binding dispute settlement mechanism under the WTO.

3. The UR shifted the thrust from enhanced market opportunities to grant of transition periods and technical assistance. Developing countries could hardly benefit from the almost 145 S&DT provisions (in the UR agreements), which mostly do not go beyond a best endeavour promise. Lack of any mechanism to ensure effective implementation of S&DT provisions in the WTO has been a major area of concern for developing countries.

The proposal in paragraph 3 mentions the following milestones:

1. 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 purposes;
2. Establishment of UNCTAD and the creation of the CTD in the GATT in 1964;
3. Addition of Part IV on Trade and Development to the GATT in 1965; and
4. Adoption of the Enabling Clause in 1979 at the end of the Tokyo Round. This process signified the growing importance of S&DT for developing countries in the multilateral trading system and, at the very least, the political recognition by developed countries of the need for S&DT to attract and accommodate developing countries in the system.

Source: [www.wto.org](http://www.wto.org)

mentation costs, in terms of financial, capacity building and technical assistance, etc.

- The transition periods shall be linked to economic criteria (debt level, level of industrial development, human development index, etc.) and social (literacy and life expectancy) criteria objectively.
- 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 Doha Declaration, and may be considered one of the important factors that contributed towards the ministerial agreement to review and strengthen all S&DT provisions in the WTO agreements.

One of the other important submissions was made recently. G-20<sup>8</sup> submitted a proposal on 28 May 2004 suggesting a framework for establishing modalities on agricultural market access (See Box: 4). Among others, the proposal called to pay attention to the level of development, situation of food security and/or livelihood security needs of developing countries. These, the G-20 argued, should be an integral part of the formula approach for tariff reduction and other commitments in respect of developing members, including LDCs.

The 31 July GC decision gives due recognition to the concerns raised by G-20. However, no concrete instructions have been made in the text. The 31 July text, with regards to the

developmental concerns of developing countries, unfortunately is again of best endeavour nature.

## ASSESSMENT OF THE WORK PROGRESSED

The deadlock in the negotiations on S&DT in the Doha agenda exposed the differences that exist between members on the issue of S&DT. The basic contention arises because of different interpretations of the Doha mandate on S&DT. Developing countries, as a group, believe that the existing mandate on S&DT clearly calls for meaningful changes in the language of the existing WTO agreements in order to make the existing S&DT provisions more effective. This would entail re-negotiating components of existing agreements that are believed to be either causing more harm than good, or that in no way confer preferential treatment to developing countries, who are unequal players. Developed countries, on the other hand, believe that language changes in the existing WTO agreements can occur only in the context of fresh negotiations, which would imply that developing countries have to be prepared for a new set of trade offs. They do not consider the work of the Special Sessions to be negotiations and hence are not prepared for any changes that alter the existing "balance of members' rights and obligations" within the WTO framework.

Developing countries feel that in line with the Doha mandate, the current work programme should consider only agreement specific proposals. Developed countries, on the other hand, feel that there should be detailed discussions on the broader 'principles and objectives' of S&DT. They are willing to consider some derogations for some countries at lower levels of development for some period of time.

Presently, there is no explicit definition of a 'developing country' although LDCs are defined according to the United Nations criteria. Any country can consider itself developing country and 'self-select' itself to benefit from S&DT provisions. One of the main stumbling blocks in the current debate on S&DT is the question of which country will be eligible. There must be a criterion or definition to define developing countries also. Developing countries, while diverging somewhat on the issues of differentiating among themselves, have argued nonetheless that the mandate is quite specific in its instructions to review all S&DT provisions and that this must be done before moving to any broader discussions.

Developed countries have stressed on incorporating the concepts of both differentiation and graduation, i.e., providing different levels of flexibility to members at different levels of development (differentiation) and establish some criteria for countries to 'graduate' out of flexibilities (graduation). They are adamant not to provide S&DT unless it is to a well determined specified group of countries. Some developing countries agree with the concept of differentiation, but feel that the actual mandate must be fulfilled first. A large number of developing countries feel that S&DT must be provided on a

non-discriminatory basis, that sufficient flexibility in the rules must be maintained in order to deviate from certain disciplines in the name of development, and that the ambit of the WTO must include tackling broader development issues (supply side constraints and infrastructure issues). These divergent views contributed to the deadlock.

The proposal for establishing a monitoring mechanism was the only proposal that was accepted by the time of 31 July 2002 report. However, there are conflicting views between developed and developing countries on the role of such a monitoring mechanism. Developing countries feel that the monitoring mechanism ought to monitor the effective implementation of S&DT provisions. On the other hand, as per developed countries, such a mechanism would monitor the effectiveness of the S&DT mandate in integrating members into the multilateral trading system.

Before the Cancun Ministerial, the question regarding the broader S&DT mandate that remained unanswered was: Will the focus be on the agreement-specific proposals or will they discuss crucial cross-cutting issues, such as the incorporation of S&DT into the architecture of WTO rules, the monitoring mechanism, the objectives and principles of S&DT, the special needs of particular groups of countries, etc? S&DT remained virtually untouched at the Cancun Ministerial. The draft text of 24 August 2003 and the one that came out during the Cancun Ministerial on 13 September reaffirmed that provisions for S&DT are an integral part of the WTO agreements. In Annex C of the Draft Ministerial Text, three further recommendations were included at Cancun. However, due to the collapse of the Cancun Ministerial, this text is rendered invalid and 28 recommendations on which there was in-principle agreement are yet to be adopted.

On 1 April 2004, CTD met for the first time after the Cancun Ministerial. Hoping to avoid pitfalls of members sticking into well-entrenched positions, which hindered progress in 2002 and 2003, the body's new Chair, Faizel Ismail, focused discussion primarily on process issues, including the way forward and the structure of the body's future work. Recognising the importance of reviving the talks, members agreed to the Chair's request to begin informal consultations aimed at identifying areas of convergence and the best way to proceed.

In a related matter, a group of developing countries – Bangladesh (on behalf of the LDC Group); India, Indonesia and Mauritius (on behalf of the African Group); and Trinidad and Tobago (on behalf of the Africa, Caribbean, Pacific states) circulated a submission on 5 April 2004 calling for, *inter alia*, 'a clear road map with specific benchmarks to fulfil the mandate on the outstanding issues in a time bound manner'. As already noted above, the 31 July decision of the GC has instructed the CTD to make recommendations on S&DT related issues latest by July 2005.

#### BOX: 4

### G-20 PROPOSAL FOR AGRICULTURAL MARKET ACCESS

#### S&DT for developing countries

Having regard to their rural development, food security and/or livelihood security needs, following elements shall be an integral part of the formula approach for tariff reduction and other commitments in respect of developing members, including LDCs:

- Developing members shall apply lower rates of tariff reductions over a longer timeframe in relation to developed members. The criteria for applying differentiated tariff cuts and for any differentiation among tariff lines shall also take into account tariff structures and conditions of developing members.
- S&DT for developing members shall be an integral part of all other market access commitments.
- Developing members shall have the flexibility to designate, under conditions, as necessary, to be agreed in the negotiations, a percentage of tariff lines as special products.
- A Special Safeguard Mechanism shall be established for use by developing members.
- Developed members shall provide duty-free and quota-free access and bind it on an MFN basis at least for a percentage to be agreed of imports from developing members and/or an agreed percentage increase over an agreed base period, whichever is higher. This commitment shall apply in particular to all tropical and other products referred to in the Preamble to the Agreement on Agriculture (AoA).

#### S&DT for LDCs

- LDCs shall be exempted from tariff reduction commitments.
- Developed members shall provide duty-free and quota-free market access for all products from LDCs.
- Supply constraints of LDCs shall be addressed through capacity building.

Source: [www.wto.org](http://www.wto.org)

### CHALLENGES CONFRONTING SOUTH ASIA

South Asia faces tremendous challenge in terms of reaping benefits from S&DT provisions under the WTO. The challenges are more profound because of the fact that S&DT provisions have merely remained in rhetoric and are yet to

be incorporated into the WTO architecture. Besides, inherent lack of strength of South Asian countries has largely prevented them from securing a better deal from the WTO. Some of the important challenges confronting developing countries in general and South Asia in particular are elucidated below.

### Best endeavour nature of S&DT provisions

S&DT provisions in most WTO agreements exist in the form of 'best endeavour clause'. This makes the enforcement of these provisions difficult. Only a handful of S&DT provisions are binding in nature, which makes it possible for developing countries, including countries in South Asia, to challenge developed countries at the dispute settlement panel. For example, a developing country would have a watertight defense in dispute settlement if it were asked to reduce agricultural tariffs by 36 percent, against the AoA's requirement of 24 percent.

However, the fact that the enforceability of a large number of S&DT provisions are either questionable or that they are unenforceable makes it impossible for developing countries to take advantage of such provisions. For the South Asian countries, this means non-materialisation of the preferential treatment that they were 'promised' by developed countries.

For example, the European Union (EU) has offered duty- and quota-free market access to products originating in LDCs. This comes as a part of S&DT to grant trade preferences. However, stringent Rules of Origin (ROO) have prevented South Asian LDCs from taking advantage of it. Besides, fact remains that unilaterally offered preferences, including the GSP, could at any time be revoked by developed countries without notice.

### Technical assistance

Most developing countries, including countries in South Asia, have been facing considerable difficulty in implementing WTO agreements on safeguards, subsidies and countervailing measures, anti-dumping, technical barriers to trade, SPS measures and TRIPS. These difficulties were supposed to be overcome through technical assistance and longer transitional periods. However, the flow of technical assistance has been very limited, primarily because the promises for technical assistance were of best endeavour nature.

A glaring example of how lack of technical assistance is hampering the targets envisaged by the WTO is that of the failure of many developing countries to make their IPR legislation TRIPS compliant before 31 December 1999. The WTO in 1995 had provided a five-year transition period to developing countries to make their IPR legislation in line with TRIPS, but that did not happen due to the lack of technical assistance from developed countries. In many cases, the transition periods available for the developing countries and the LDCs are of no value if technical assistance or financing for development is not provided during that time.

The financial and technical resources for complying with the requirements of the WTO are high and beyond the resources of South Asian countries. As a result, South Asia has been suffering heavy losses in export income. In one of the special CTD sessions (14 June 2002), Sri Lanka had 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 US\$ 8 million per annum, of which the government could provide only three percent. Non-compliance with health standards was costing the country 2,400 jobs per year, about four percent of the labour force in the sector.

### Weak bargaining capacity

South Asian countries have a relatively weak bargaining capacity. One of the reasons for it is the insignificant volume of trade contribution they make at the global level. South Asia's trade comprises hardly 1.2 percent of the global trade. As such, they do not have the economic muscle to put the pressure on developed countries to respect S&DT clauses contained in different WTO agreements. Say for instance, the threat of trade sanctions by South Asian countries may go unheeded in the US given the insignificant impact that it would have on the US economy.

Besides, there is a general lack of capacity to understand and interpret WTO provisions in most South Asian countries, thereby limiting their participation at the WTO level. Nepal, latest entrant to the WTO, and Bhutan, are lagging behind considerably in terms of interpreting provisions. Apart from India, Sri Lanka and Pakistan, none of the other South Asian countries could make any proposals suggesting or recommending changes or amendments to clauses and articles in different WTO agreements.

In addition, building capacity of all South Asian nations seems a way out for the region to form strong coalition and enhance bargaining capacity to force changes at the WTO level. However, civil society organisations (CSOs), which can play an instrumental role in shaping opinions, are yet to be properly involved in consultative processes. South Asia does not seem to have realised the strong role that CSOs can play.

### Incoherent policy making

There is a severe incoherence in global economic policy-making, where the flexibility allowed through S&DT is practically denied or proactively discouraged under the standard structural adjustment programmes that the international financial institutions, such as the International Monetary Fund (IMF) and the World Bank, recommend to developing countries. Multilateral financial institutions often influence domestic policies through loan conditionalities. For example, the AoA allows LDCs like Nepal to provide subsidies in agriculture to the extent of 10 percent of agricultural gross domestic product (GDP). However, the Asian Development Bank forced the Nepalese government to revoke subsidies in fertilizers and shallow tube wells. This is in contravention to the S&DT provisions allowed by the WTO. Such conditionalities are being experienced by all South Asian countries, and these come as a major challenge. Apart from the conditions imposed by such lending institutions, acceding countries often are asked by developed members to comply with WTO-plus provisions. In South Asia, Nepal has already faced such pressure during its accession process.

## CONCLUSION

Since S&DT evolved out of the developmental concerns of weaker economies around the globe, it will be required as long as there is a gap between the economic capacities and levels of development between the different WTO members. The rationality of S&DT requires that international organisations universally accept the importance of the concept and embody it in their institutionalised programmes. Developed countries need to have an undisputed political commitment for implementing S&DT in its true spirit. Besides, it is important that S&DT provisions have a in-built mechanism that allows the monitoring of their operation. Various committees at the WTO dealing with S&DT should also be under an obligation to prepare reports on implementation and utilisation of S&DT provisions in the relevant WTO agreements. There should be a prioritisation of agenda and informal consultations preceding the finalisation of issues. S&DT provisions should go beyond the experience with actual utilisation, and look into the legal nature, as well as the economics and politics of S&DT as a concept. South Asia will continue to face challenges unless S&DT provisions are made precise, effective and operational.

## RECOMMENDATIONS

- South Asian countries should vigorously pursue S&DT proposals made by other developing countries and groups, apart from preparing and following up on their own proposal.
- South Asian countries must involve CSOs during consultative processes on S&DT to increase their bargaining capacity at the multilateral level.
- South Asian countries must collectively raise their voice at the multilateral level to make S&DT provisions precise, effective and operational.
- South Asia needs to be vigilant to ensure that S&DT provisions do not remain best endeavour clauses and are honoured by developed countries.
- South Asian countries must be provided with financial and technical assistance for capacity building, addressing their supply side constraints and product diversification.
- South Asian countries should be provided with flexibilities to pursue domestic trade and economic policies that are in harmony with their developmental needs. ■

## ENDNOTES

<sup>1</sup> World's largest group of developing countries.

<sup>2</sup> IISD. 2003. *IISD Trade and Development Brief*. No. 2. Winnipeg.

<sup>3</sup> Paragraph 44 of the Declaration of the 4th Session of the Ministerial Conference. WTO document WT/MIN (01)/DEC/1

<sup>4</sup> Paragraph 12.1 of the Decision on Implementation Issues and Related Concerns, adopted by the 4th Session.

<sup>5</sup> See under document symbol TN/CTD at <http://docsonline.wto.org>

<sup>6</sup> Cuba, Dominican Republic, Honduras, India, Indonesia, Kenya, Malaysia, Pakistan, Sri Lanka, Tanzania, Uganda and Zimbabwe.

<sup>7</sup> WTO document WT/GC/W/442 dated 19 September 2001.

<sup>8</sup> Argentina, Bolivia, Brazil, Chile, China, Cuba, Egypt, India, Indonesia, Mexico, Nigeria, Pakistan, Paraguay, Philippines, South Africa, Thailand, Tanzania, Venezuela, Zimbabwe

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Launched in December 1994 at Nagarkot, Nepal by a consortium of South Asian non-governmental organisations, South Asia Watch on Trade, Economics & Environment (SAWTEE) is a regional network that operates through its secretariat in Kathmandu and 11 member institutions from five South Asian countries, namely Bangladesh, India, Nepal, Pakistan and Sri Lanka. Registered in Kathmandu in 1999, the overall objective of SAWTEE is to build the capacity of concerned stakeholders in South Asia in the context of liberalisation and globalisation.

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