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Introduction: Definition of Special and Differential Treatment

Special and differential treatment is generally viewed as an important means of assisting small and low-income countries to benefit from opportunities from international trade in services and to make trade in services supportive of economic development.[1] However, it is fraught with challenges of both a conceptual and practical nature. Devising arrangements and measures to make SDT an effective policy tool in reality is very challenging and one of the reasons that SDT has often remained in the realm of 'best endeavours' or exhortatory clauses.

Agreeing upon what constitutes special and differential treatment is the first challenge. There are different conceptions as to what it includes. For some, SDT implies only explicitly preferential and non-reciprocal trade measures. Others view SDT as including the asymmetrical outcome of negotiated trade agreements. For all, SDT usually implies some form of technical assistance, but what this assistance involves and whether or not it is compulsory or hortatory is usually left vague. Special and differential issues appear in different names and forms, including 'preferential regimes', 'development dimension', 'policy spaces', 'flexibility' and 'development friendly' rules, among others. In this paper most attention is on negotiating outcomes and technical assistance, because in reality these are the forms of SDT that smaller and poorer countries are most likely to receive.

What everyone seems to agree on is that SDT should result in improving the competitiveness of developing country suppliers of services and increasing their degree of participation in world markets. SDT should thus help reduce the gaps between developing and developed countries in terms of share of world trade, diversification of production, and institutional and human resource capacity by permitting certain policy measures and international rules that should partially compensate for these differences.

One of the key priorities of the Doha Development Round of trade negotiations is strengthening the participation of developing countries in the multilateral trading system. SDT can be instrumental in achieving this goal, when it is appropriately designed. SDT can also be useful for advancing the causes of greater competitiveness and heightened trade in the context of regional trade agreements, particularly for those between partners of unequal size and levels of development.

SDT is applied rather differently in the GATS than in other WTO Agreements,[2] in which it often takes the form of less rigorous obligations and/or longer time periods for implementation.[3] Under the GATS, by contrast, the general obligations – such as those relating to MFN treatment and domestic regulation – apply equally to all members, whether they are developed, developing or LDCs. No additional time was given to developing countries or LDCs for implementation of these obligations. The agreement does call for technical assistance, but without any binding commitments as to amount

or timing. It also contains some 'soft', best endeavour type statements concerning the needs of developing countries.

However, the architecture of the GATS does allow all WTO members an unparalleled degree of flexibility to choose the nature, extent and speed of their services liberalisation. In addition, the agreement specifically calls for more negotiating flexibility for developing countries, and this can be viewed as a form of SDT. Indeed, the freedom given by the GATS to members to undertake the number and type of commitments and thus the degree of liberalisation they desire has led the OECD to describe the GATS as one of the most 'development friendly' of the WTO agreements (OECD, 2006). RTAs offer a similar degree of flexibility.

SDT in this context should be seen somewhat differently from the way in which it is viewed in the case of goods, where different levels of (measurable) tariff reductions are easily understood and where introduction of these changes domestically does not require much technical expertise. In contrast, given the heavily regulated nature of most service industries, liberalisation requires regulatory and structural changes that pose considerable challenge and require appropriate expertise. Thus, much of the justification for calling for SDT in services in the form of technical assistance for regulatory reform stems from the intrinsic nature of service activities themselves. Too rapid or poorly sequenced services liberalisation, unaccompanied by appropriate regulatory reform, can be harmful and counterproductive. This is the case whether services liberalisation is being carried out for domestic reasons only or as part of a negotiated outcome in the context of the GATS or of RTAs.

In this paper we first analyse the provisions of the GATS, as well as the outcomes of the Uruguay Round negotiations relevant to special and differential treatment in services, the SDT elements in the DDA offers that are publicly available, and the provisions and outcomes of a number of RTAs.[4] The paper focuses on the two modes of supply where developing countries can most benefit from expanded trade in services for their exports: Mode 1, cross-border supply of services; and Mode 4, the movement of natural persons.[5] It then assesses the difficulties faced by firms in small and low-income countries in maximising export and investment opportunities from RTAs, and makes recommendations for devising pro-development SDT arrangements and measures that could be considered by Commonwealth developing countries that are negotiating RTAs liberalising trade in services. The paper discusses ways in which the benefits of services trade liberalisation for small, low-income countries might be measured. Finally, it advises on approaches through which SDT could be advanced in the WTO.

The categories of SDT that we have chosen for analysis are the following:

1. Architecture of the agreements

As explained above, the GATS and regional trade agreements are designed in a way that gives countries a great deal of flexibility in term of what sectors they wish to liberalise, as well as the degree and speed of liberalisation. This gives developing countries and LDCs room to liberalise only to the extent and at the pace that they wish.

2. Flexibility in obligations and procedure

This category covers the provisions recognising that developing countries are not expected to make as extensive market-opening commitments as are the developed countries. In addition, this category might include allowing developing countries to offer measures of assistance to their service providers to encourage exports or the application under more lenient conditions of safeguards and subsidy rules or in meeting procurement thresholds, should these disciplines be agreed upon.[6] The safeguards issue is discussed in more detail in Section 2.8.

3. Negotiating outcomes

This part of our analysis examines the results of the negotiations in the GATS to determine whether the flexibility built in to the agreement has been realised in practice, in the form of fewer commitments on the part of developing countries. Although none of the North–South RTAs we have examined contain specific language calling for flexibility in the negotiations, we have analysed these agreements to determine whether they too have resulted in different levels of commitments by the developed and developing countries

4. Technical assistance

This is a broad category that encompasses many different types of actions and measures in the services area and may include the furnishing of information as well as actual expertise for services promotion or regulatory reform. For example, the GATS requires developed countries to establish contact points to facilitate the access of developing countries' service suppliers to information related to their respective markets concerning commercial and technical aspects of the supply of services; registration, recognition and obtaining of professional qualifications; and the availability of services technology. Other forms of technical assistance can include help with regulatory reform for key infrastructure services or the training of experts in the services area.

5. Longer time periods for implementation

This category of SDT gives developing countries more time to put into place agreed liberalisation. It is therefore legally binding, but does not allow variations in the disciplines themselves. Although the GATS itself and most of the RTAs we have examined contain no general provisions allowing developing countries more time to implement their obligations, it is possible in the negotiating process to undertake to liberalise a particular sector or mode at some point in the future, rather than immediately. However the effectiveness of the transition periods in achieving their objectives is not necessarily guaranteed or factored in. An UNCTAD report noted that:

> Time-bound derogation from obligations also assumes the existence of both institutional and resource capacity of take maximum advantage of the relevant provisions. For most LDCs these capacities do not exist.[7]

The additional time often serves no function if appropriate technical assistance is not provided during that time.[8]

6. 'Best endeavour' clauses.

These provisions constitute the equivalent of promises to attempt to carry out agreed provisions, but they are not binding and are difficult to assess, as trade agreements usually contain no mechanisms for a monitoring process or any benchmarks to assess the actual implementation and effectiveness of such provisions.