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Commercial Diplomacy Programme

TRAINING TOOLS FOR MULTILATERAL TRADE NEGOTIATIONS:

SPECIAL & DIFFERENTIAL TREATMENT

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DITC / Trade Negotiations and Commercial Diplomacy Branch
Commercial Diplomacy Programme

http://www.unctad.org/commdip
EMAIL: commercial.diplomacy@unctad.org

INTRODUCTION

This compilation of training tools on the special and differential treatment that is provided for developing countries within the WTO context, is designed with trainers and reseachers in mind.

It consists of:

1. a table summarising the WTO Special and Differential Treatment provisions as well as the main elements of the proposals tabled by developing countries during the preparatory process for the 3rd Ministerial Conference in 1999 and the current multilateral trade negotiations on services and agriculture;
2. a background paper on Special and Differential Treatment in the context of globalization;
3. selected bibliography for further analysis,
4. a presentation of an UNCTAD assessment on Special and Differential Treatment (electronic version of this presentation is available on request)[1].

[1] Commercial Diplomacy Programme, DITC/UNCTAD, Bureau E 8001-E8004, 8-14 Avenue de la Paix, 1211 Geneva 10, Switzerland. Tel: +41 22 907 6313/5752, Fax: +41 22 907 0247; Email: commercial.diplomacy@unctad.org.

TABLE OF CONTENTS

SUMMARY OF WTO SPECIAL AND DIFFERENTIAL TREATMENT PROVISIONS AND CORRESPONDING PROPOSALS

ISSUES	WTO LEGAL INSTRUMENTS	SUMMARY OF THE PROVISIONS ON SPECIAL AND DIFFERENTIAL TREATMENT IN WTO AGREEMENTS[2]	MAIN ELEMENTS OF THE PROPOSALS ON S&D SUBMITTED IN 1999 AND 2000 TO THE WTO GENERAL COUNCIL AND NEGOTIATING BODIES [3]
REGIONAL TRADE AGREEMENTS AMONG DEVELOPING COUNTRIES	**Special and Differential Treatment, Reciprocity, and Participation of Developing Countries. Decision of 28-11-1979 (L/4903): Enabling Clause.**	Special and differential treatment could be granted to least developed and developing countries non-reciprocally with regards to: ➢ regional or general agreements concluded among developing countries with the aim of mutually reducing or eliminating tariffs in conformity with the criteria or conditions determined by the parties; ➢ preferential tariffs given by developed countries to products originating from developing countries in conformity with the GSP.	➢ To stress compliance with the Enabling Clause so as to ensure that preferential treatment is generalised, non-discriminatory and non-reciprocal in nature. ➢ To closely monitor such compliance. ➢ A waiver shall be granted to all preference-giving countries from 1 January 2000 to 31 December 2010.

[2] Based on GATT, " A Description of the Provisions Relating to Developing Countries in the Uruguay Round Agreements, Legal Instruments and Ministerial Decisions", COMTD/W/510, 1994. This summary is not intended to provide a detailed analysis of the WTO existing provisions. It is a general guide to identify the main issues addressed in these provisions.

[3] Proposals concerning S&D submitted by WTO Members before the Third WTO Ministerial Conference in Seattle (Documents series WT/GC/W/), and proposals concerning Special and Differential Treatment which have been tabled in the year 2000 to date (September 2000) in the context of the agricultural and services negotiations. Some ideas discussed during UNCTAD informal meetings and workshops on the formulation of the positive agenda have also been included (see UNCTAD, *Positive Agenda and Future Trade Negotiations*, Geneva and New York, UN, 2000).

TARIFF PREFERENCES[4]	**Art. XVIII** **Art. XXXVI** **GATT 1994**	➢ Developed countries do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to trade of less-developed countries.	➢ Preference-giving countries shall not subject preferential market access to conditionalities in order to fully comply with the provisions of the Enabling Clause. ➢ Preference-giving countries shall not initiate any form of unilateral action against preference-receiving countries, including through any other form of discriminatory characterisation.
ANTIDUMPING	**Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994**	**RECOGNITION OF INTERESTS** ➢ Special regard must be given by developed countries to the special situation of developing countries when considering the application of anti-dumping measures. ➢ The possibility of finding constructive remedies provided by the Agreement has to be explored before applying anti-dumping duties, which affect the essential interests of developing countries.	➢ Revision of the criteria concerning the initiation of investigation and review procedures. ➢ Longer time frames in order to restrict the initiation of back-to-back investigations for the same product. ➢ To raise the existing *de minimis* dumping margin of 2 per cent of export price below which no anti-dumping duty can be imposed for developing countries. ➢ To increase the threshold volume of dumped imports

[4] Further information on GSP at www.unctad.org/gsp/index.htm and www.unctad.org/gsp/rulesoforigin/default.htm.

			normally be regarded as negligible for imports from developing countries.
AGRICULTURE	**Agreement on Agriculture** **Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing**	**MORE FLEXIBILITY TO IMPLEMENT COMMITMENTS AND FEWER OBLIGATIONS** Developing countries are allowed to implement the reduction commitments over a period of 10 years. (6 years for developed countries). ➢ Least-developed countries are exempted from the reduction commitments ➢ Rates of reduction applying to developing countries in the areas of market access, domestic support and export competition will be two-thirds of those applying to developed countries. ➢ Developing countries have the flexibility to offer ceiling bindings on unbound products in lieu of reduction commitments on the tariff levels applied in 1986. ➢ Certain amber box policies, including investment subsidies general available to agriculture, adopted by developing countries are excluded from the reduction commitments (art. 6.2). ➢ Developing countries may use the following subsidies, which are subject to reduction commitments in the case of developed countries, to promote exports a)subsidies to reduce the costs of marketing exports, including handling, upgrading and other processing costs, and the costs of international transport; and b)internal transport charges on export shipments on terms more favourable than for domestic shipment. ➢ Under the *de minimis* provision, domestic support policies of developing countries which do not exceed 10 per cent of the total value of production (product-specific or non-product-specific) are excluded from reduction commitments.	**PROPOSALS PRE-SEATTLE** ➢ Improvement of market access opportunities for developing and least-developed countries. This range of measures should be targeted in areas where developing countries have an actual or potential export interest. ➢ Reduction of tariff escalation and tariff peaks. ➢ Developing countries must be allowed the flexibility to use domestic supports and transparent import controls. ➢ Elimination of export subsidies by developed countries. ➢ The Marrakesh Decision should be revised in order to ensure its effective implementation through the incorporation of concrete, operational and contractual measures, including provisions for technical and financial assistance. ➢ The Special Safeguard Provision should be made permanent for use by all developing countries

	Countries.	➢ Disciplines on export prohibitions and restrictions are not applicable, unless the developing country Member is a net-food exporter of the specific foodstuff concerned. ➢ Under certain conditions, the provisions of paragraph 2 of Article 4 (i.e. tariffication of non tariff measures) shall also not apply with effect from the entry into force of the WTO Agreement to a primary agricultural product that is the predominant staple in the traditional diet of a developing country Member. ➢ Special and Differential treatment is given with regards to public stockholding for food security purposes and domestic food aid. **RECOGNITION OF INTERESTS** ➢ Developed countries are to provide greater market access for agricultural products of particular interest to developing countries.. ➢ The Ministerial Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed Net Food-Importing Developing Countries acknowledges the possibility that net food-importing developing countries, and least-developed countries, may experience negative effects in terms of the availability of adequate supplies of basic foodstuffs from external sources on reasonable terms and conditions, including short-term difficulties in financing normal levels of commercial imports. Members agreed to: - carry out periodical review of the level of food aid; - adopt guidelines that ensure that an increasing proportion of basic foodstuffs is provided to least-developed and net food-importing developing countries in the form of a grant, or on appropriate concessional terms in line with Article IV of the Food Aid Convention; - ensure that any agreement relating to agricultural export credits makes appropriate provision for differential treatment in favour of least-developed and net food-importing developing	as part of Special and Differential Treatment. However, the "triggers" must be tightened so that the Special Safeguard Provision is not abused. Developed countries should depend on the general safeguard provisions of the GATT 1994. **PROPOSALS POST-SEATTLE** ➢ A Development Box should be created with policy instruments that aim to, among other things, protecting and enhancing developing countries' domestic food production capacity particularly in key staples and increasing food security and food accessibility, especially for the poorest. ➢ Flexibility in levels of domestic supports. Developing countries should be allowed an additional 10 per cent on their de minis support level, i.e. bringing the level from 10 to 20 per cent. ➢ Prohibit developed countries from the use of the Special Safeguard Clause. This Clause instead should be opened up to all developing countries. Developing countries should be

		countries; - give full consideration in the context of Members' aid programmes to requests for the provision of technical and financial assistance to least-developed and net food-importing developing countries to improve their agricultural productivity and infrastructure.	allowed to invoke this based on low prices or excess of imports. ➢ Dumping in any form *must* be prohibited. All forms of export subsidies (direct or indirect) by developed countries must be eliminated immediately. ➢ Competition in agriculture must be addressed in this review. Developing countries must be given an easily accessible mechanism to protect themselves against the abuse of monopoly and to seek compensation.
SANITARY AND PHYTOSANITARY MEASURES	**Agreement on Sanitary and Phyto-sanitary Measures**	**RECOGNITION OF INTERESTS** ➢ Members are to take into account the special needs of developing countries, and in particular of the least-developed countries, in the preparation and application of sanitary or phytosanitary measures. ➢ Members should accord longer time frames for compliance with their new sanitary or phytosanitary measures on products of interest to developing countries, where there is scope for a phased introduction of these new measures. **IMPLEMENTATION PERIOD** ➢ The Committee on Sanitary and Phytosanitary Measures is enabled to grant to a developing country Member, specified, time-limited exceptions in whole or in part, from obligations under this Agreement, taking into account its financial, development and trade needs.	**PROPOSALS PRE-SEATTLE** ➢ International standard-setting organizations shall ensure the presence of countries at different levels of development and from all geographical regions, throughout all phases of standard setting. ➢ In the formulation of such standards, the specific conditions prevailing in developing countries shall be taken into account. Only standards formulated in such a manner shall be recognized as “international standards”.

		➢ The *least-developed countries* may delay the application of all of the provisions of this Agreement related to their measures affecting imports for a period of five years following the entry into force of the WTO. *Other developing countries* may delay application for two years with respect to their existing import requirements, where this is justified by a lack of technical expertise, infrastructure or resources. **TECHNICAL ASSISTANCE** ➢ Members agree to facilitate the provision of technical assistance to developing countries, either bilaterally or multilaterally, so as to comply with their trading partners' requirements. ➢ Where substantial investments are required in order for an exporting developing country Member to fulfill the sanitary or phytosanitary requirements of an importing Member, the latter is to consider providing the necessary technical assistance. ➢ The WTO Secretariat will draw the attention of developing countries to any notification relating to products of particular interest to them. ➢ Members should encourage and facilitate the active participation of developing countries in international organizations related to sanitary and phytosanitary regulations.	➢ The principle of equivalency (Article 4) is invariably interpreted as meaning "sameness". Article 4 shall be clarified so that developing countries can enter into equivalency agreements. Article 10:2, which provides for longer time frames for compliance on products of interest to developing countries has only been followed in the breach. This provision should be modified to make it mandatory/obligatory for developed countries to provide longer time frames for compliance of new SPS measures for products from developing countries. ➢ Notification procedures should be simplified. ➢ Technical assistance offered to developing countries should be enhanced in terms of quality and should be delivered as and when required.
SUBSIDIES AND	**Agreement on Subsidies and Counter vailing Measures**	**RECOGNITION OF INTERESTS** ➢ For the time period when export subsidies and subsidies contingent upon the use of domestic over imported goods granted by developing countries are permitted (see below), the relevant	**PROPOSALS PRE-SEATTLE** ➢ Subsidies used by developing countries for development, diversification and upgradation

COUNTERVAIL-ING MEASURES		provision for dispute resolution is that relating to actionable subsidies (i.e. Article 7), and not that relating to prohibited subsidies (i.e. Article 4). ➢ While the subsidies specified in Article 6:1 are in general presumed to result in serious prejudice, such a presumption will not apply in the case of developing countries. In these cases, serious prejudice has to be demonstrated on the basis of positive evidence. **FEWER OBLIGATIONS** ➢ Annex VII countries (i.e. least-developed countries and certain other specified countries until such time as their GNP *per capita* reaches $1000 *per annum*) are not subject to the prohibition on export subsidies applicable to other WTO Members. Other developing countries are exempted from this prohibition for a limited period of time (see below). ➢ Subsidies granted by developing countries are actionable if they cause injury to an industry in the complainant's market, or nullify or impair other Members' benefits under GATT 1994 by displacing or impeding imports of like products into the subsidizing developing country Member's market. Serious prejudice (including displacement from third-country markets) is not actionable. These limitations on actionability do not apply to subsidies referred to in Article 6:1. **IMPLEMENTATION PERIOD** ➢ Developing countries, other than Annex VII countries, are entitled to an eight year transition period within which to phase out export subsidies before being subject to prohibition. Meanwhile, these countries are prohibited from increasing their level of export subsidies. Extensions of the eight-year transitional period may be granted by the Committee upon request. ➢ A developing country Member which attains export competitiveness	of their industry and agriculture are actionable under the Agreement. Article 8:1 of the Subsidies Agreement dealing with non-actionable subsidies shall be expanded to include subsidies referred to in Article 3:1 of the Agreement when such subsidies are provided by developing-countries, so that action cannot be taken against them either through the dispute settlement mechanism or through the countervailing duty route. ➢ Article 11:9 should be modified to provide an additional dispensation for developing countries, in as much as that any subsidy investigation shall be immediately terminated in cases where the subsidy being provided by a developing country is less than 2.5 per cent ad valorem, instead of the existing de minimis of 1 per cent presently applicable to all Members. ➢ The present de minimis level of 3 per cent, below which countervailing duties may not be imposed for developing countries, needs to be increased (Article 27:11).

		in a given product has to phase out export subsidies on such products: • Within eight years for Annex VII countries; and • Within two years for other developing countries. ➢ The prohibition of the granting of subsidies on the use of domestic over imported goods does not apply to developing countries for a period of five years and to least-developed countries for a period of eight years. **COUNTERVAILING MEASURES** ➢ The Agreement requires termination of countervailing duty investigations where the level of subsidization is *de minimis*, defined generally as one percent. For developing countries, this is increased to 2 per cent. For those developing countries listed in Annex VII, as well as for other developing countries that eliminate their export subsidies before the end of the eight-year transition period the level is 3 per cent. The provision for a *de minimis* of 3 per cent expires after eight years from the date of entry into force of the WTO Agreement. The Subsidies Committee shall, upon request by a developing country Member, review the consistency of a Member's countervailing measure with the obligation to provide special and differential treatment for developing countries.	➢ The language of Annex I of the SCM Agreement, particularly item (k), shall be reviewed to permit developing countries to provide competitive export financing vis-à-vis the conditions found in the international market or those offered by the credit agencies of developed countries (controlled by and/or acting under the authority of the governments).
TECHNICAL BARRIERS TO TRADE	**Agreement on Technical Barriers to Trade**	**RECOGNITION OF INTERESTS** ➢ The special development, financial and trade needs of developing countries shall be taken into account - (i) by all Members - in the implementation and operation of the Agreement both	**PROPOSALS PRE-SEATTLE** ➢ For standards which are developed with a possible view of using them as a basis for TBT or SPS measure a narrower

		nationally and multilaterally (Article 12:2); and in the preparation and application of their technical regulations, standards and conformity assessment procedures so as to ensure that they do not create unnecessary obstacles to exports from developing countries (Article12:3). (ii) by developed Members, during consultation with respect to the special difficulties of developing countries in formulating and implementing standards, technical regulations and conformity assessment procedures (Article 12:9). **FEWER OBLIGATIONS** ➢ Developing countries should not be expected to use international standards that are not appropriate to their situation as a basis for their technical regulations, standards or test methods. **IMPLEMENTATION PERIOD** ➢ Upon request, a developing country Member may be granted, by the Committee on Technical Barriers to Trade, specified, time-limited exceptions in whole or in part from obligations under this Agreement. The Committee shall, in particular, take into account the special problems of the least-developed countries. **TECHNICAL ASSISTANCE** ➢ The WTO Secretariat will draw the attention of developing countries to any notification relating to products of particular interest to them. ➢ Technical assistance and advice, especially for developing countries, will be provided by Members upon request on mutually agreed terms and conditions. Priority shall be given to the needs of least-developed countries in providing technical assistance	definition could be adopted. Such narrower definition could provide that for the purpose of use in technical and SPS regulations, a standard prepared by an international body shall be considered as an international standard only if: - in the work on formulation of such standard, an agreed minimum percentage of countries from different regions have participated in the technical work throughout the process relating to its adoption; and - it has been adopted by consensus.

		➢ Members are to grant technical assistance to developing countries so as to ensure that the preparation and application of technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to the exports of developing countries. Terms and conditions of technical assistance will be determined in light of the stage of development of the Member, particularly in the case of least-developed countries.	
TEXTILES	**Agreement on Textiles and Clothing**	**RECOGNITION OF INTERESTS** ➢ The Preamble recalls that least-developed countries should be accorded special treatment. ➢ Article 1 refers to three categories of Members which should receive treatment better than the norms otherwise prescribed in the Agreement: (i) Paragraph 2 emphasizes that small suppliers must be given meaningful increases in access possibilities, while new entrants to trade in this sector must be allowed to develop commercially significant trading opportunities. In a footnote to this paragraph, it is stated that exports from least-developed Members may, to the extent possible, also benefit from such provision. (ii) Paragraph 3 recognizes that, to the extent possible, Members who did not participate in the MFA IV warrant special treatment. This is reflected in specific terms in the time periods for making notifications. (iii) Paragraph 4 recognizes that cotton producing exporting Members have particular interests which should be reflected, in consultation with them, in the implementation of the Agreement.	**PROPOSALS PRE-SEATTLE** ➢ The implementation of the Agreement on Textiles and Clothing (ATC) is a key issue for many developing countries and LDCs. The proposals submitted in the pre-Seattle process focussed on ensuring a more rapid implementation of the ATC rather than modifying the existing S&D provisions.

		TRANSITIONAL SAFEGUARD ➢ In the application of the transitional safeguard, significantly more favourable treatment should be given to exporters from least developed countries, small suppliers and developing countries dependant upon the wool sector as well as Members who have a significant proportion of their exports in outward processing trade. ➢ Transitional safeguard actions cannot be taken against exports of handloom fabrics from developing countries; hand-made cottage industry products or folklore handicrafts when properly certified; historically traded products such as bags, sacks, etc. from jute and some other fibres; and pure silk products. Any safeguard action taken in respect of such products (of interest to developing countries) shall be based on Article XIX of GATT 1994. **IMPLEMENTATION PERIOD** ➢ MFA members without restraints (most of which are developing countries) have 60 days after entry into force of the Agreement, and non-MFA members have 6 months, to give notice as to whether they wish to have the right to use the special transitional safeguard mechanism. (MFA members with restraints have automatically the right to use such a mechanism.). ➢ Longer time frames for implementing certain obligations are provided for Members which did not have restraints under the MFA. Therefore, for the Members with MFA restraints (all of which are developed countries), full details of their first integration programme must be notified not later than 1 October 1994. For other former MFA members (most of which are developing countries), such notification is required not later than 60 days following the entry into force of the Agreement, and for non-MFA members, not later than the end of first year of operation.	

INVESTMENTS	**Agreement on Trade-Related Investment Measures**	**FEWER OBLIGATIONS** ➢ Particular recognition is given to the right of developing countries to temporarily apply TRIMs figuring in the Illustrative List in accordance with Article XVIII:C (protection of infant industries) and GATT rules on balance-of-payments safeguard measures (i.e. GATT Article XVIII:B, the 1979 Declaration and the Uruguay Round Understanding). **IMPLEMENTATION PERIOD** ➢ Developing countries will have five years to eliminate all GATT inconsistent TRIMs, whilst developed countries will have only two years. **Least-developed countries** will have a seven-year transitional period. ➢ A developing country Member which demonstrates particular difficulties in implementing the provisions of the Agreement may have this transitional period extended by a decision by the Council for Trade in Goods. When analysing this question, the Council will take into account the individual development, financial and trade needs of the Member concerned.	**PROPOSALS PRE-SEATTLE** ➢ Article 5.3, which recognises the importance of taking account of the development, financial and trade needs of developing countries while dealing with trade-related investment measures, has remained inoperative and ineffective. The provisions of this Article should therefore be suitably amended and made mandatory.
	General Agreement on Trade in Services	**RECOGNITION OF INTERESTS** ➢ There is a recognition of the right of Members to regulate the supply of services in order to meet national policy objectives. Due to the asymmetries existing with respect to the degree of development of services regulations in different Member countries, the particular need of developing countries to exercise this right is	**PROPOSALS PRE-SEATTLE** ➢ Appropriate flexibility for developing countries should be provided for in accordance with the principle of progressive liberalization, as contained in

SERVICES		recognized. **FEWER OBLIGATIONS** ➢ Flexibility in the application of Article V:1 requirement for substantial sector coverage and elimination of discrimination between Members in context of an agreement entered into by Members with a view to liberalising trade in services. ➢ Appropriate flexibility will be provided for individual developing countries for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and, when making access to their markets available to foreign service suppliers, attaching to it conditions aimed at achieving the increasing participation of developing countries, as stated in Article IV. **IMPLEMENTATION PERIOD** ➢ Each Member is to establish one or more enquiry points to provide specific information on laws, regulations or administrative guidelines which significantly affect its trade covered by specific commitments. While these enquiry points are to be established within two years from the entry into force of the Agreement, appropriate flexibility with respect to the time limit within which such enquiry points are to be established may be agreed upon for individual developing countries. **TECHNICAL ASSISTANCE** ➢ Technical assistance to developing countries is to be provided at the multilateral level by the WTO Secretariat and will be decided upon by the Council for Trade in Services. **GATS ANNEX ON TELECOMMUNICATIONS**	Article XIX, paragraph 2 of the GATS. ➢ Any future negotiations in GATS should be guided by the architecture based on the positive list, request and offer approach, no prior exclusion of any mode and by the principles outlined in Article IX for developing countries. ➢ Mode 4 commitments undertaken by developed countries being modest, there is a need for making substantially higher commitments in this area if the balance of benefits under GATS is to be preserved. ➢ Negotiating credits should be granted for autonomous liberalization undertaken by developing country Members, adopting as the basis for the negotiation those commitments made in the Uruguay Round and subsequent mandated sectoral negotiations (Article XIX(3)). ➢ Special emphasis must be placed on service sectors important to developing countries (e.g. tourism). **PROPOSALS POST-SEATTLE** NEGOTIATIONS UNDER GATS

		➢ Provision for placing reasonable conditions of access to public telecoms transport networks and services consonant with the need to strengthen domestic telecoms infrastructure and increase participation in international trade. ➢ In order to facilitate improvement of telecommunications infrastructure, Members and their suppliers are encouraged to participate, to the "fullest extent practicable" in development programmes of international and regional organizations. ➢ Members should provide information "where practicable" to developing countries regarding telecommunications services and technological developments.	ARTICLE X – EMERGENCY SAFEGUARD MEASURES: Inclusion of S&D in an emergency safeguard mechanism (ESM). S&D could have two facets: (i) establishment of a threshold, (ii) developing countries should be able to apply a safeguard for a longer period and/or have more flexibility to re-apply such measure.
INTELLECTUAL PROPERTY	**Agreement on Trade-Related Aspects on Intellectual Property Rights**	**IMPLEMENTATION PERIOD** ➢ Developing countries may delay the date of application of the provisions of the Agreement for five years (developed countries have only a one-year transitional period). However, the obligation to provide national treatment and most-favoured nation treatment is to be adhered to one year following the entry into force of the Agreement. ➢ Developing country Member may delay the application of the provisions on product patents for an additional period of five years for areas of technology not so protectable in its territory at the end of the transitional period of five years mentioned above. ➢ Least-developed countries may delay for eleven years the date of application of the provisions of the Agreement. However, the obligation to provide national treatment and most-favoured nation treatment is to be adhered to one year following the entry into force of the Agreement. The Council for TRIPS shall extend this period upon a duly motivated request from a least-developed country.	**PROPOSALS PRE-SEATTLE** ➢ Extension of the transition period for the developing countries. ➢ Amendment of Article 27:3(b) to increase the scope of protection to include protection of indigenous knowledge and farmers' rights. ➢ Consideration of the compatibility between the TRIPS Agreement and the Convention on Bio-Diversity. ➢ Articles 7 and 8 of the TRIPS Agreement to be operationalized by providing for transfer of technology to developing countries on fair and mutually

		TECHNICAL ASSISTANCE ➢ Developed countries shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed countries, in order to enable them to create a sound and viable technological base. Developed countries are to provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favour of developing and least-developed countries. This cooperation is to include assistance in the preparation of domestic legislation on the protection and enforcement of intellectual property rights, as well as on the prevention of their abuse. Developed countries are to provide support regarding the establishment or reinforcement of domestic offices and agencies which are relevant for these matters, including the training of personnel.	advantageous terms.
BALANCE OF PAYMENTS	**Understan-ding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994** **(see also article XVIII: B of GATT)**	**PROCEDURES FOR BALANCE-OF-PAYMENTS CONSULTATIONS:** ➢ Consultations with the Balance-of-Payments Committee may be held under simplified procedures in the case of: • least-developed countries; or • a developing country Member pursuing liberalization efforts in conformity with a time-schedule already presented to the BOP Committee; or • a developing country Member for which a Trade Policy Review is scheduled for the same year as the BOP consultations. ➢ The Understanding provides for more than two successive consultations under simplified procedures only in the case of least-developed countries. **TECHNICAL ASSISTANCE**	➢ Article XVIII shall be clarified to the effect that only the Committee on Balance of Payments shall have the authority to examine the overall justification of BOP measures. While examining the overall justification the Committee shall keep in view that Article XVIII is a special provision for developing countries and shall ensure that Article XVIII does not become more onerous than Article XII (*i.e. Restrictions to safeguard the Balance of Payments*).

		Technical assistance services of the WTO Secretariat shall be available to assist any developing country Member in preparing documentation for the consultations.	
CUSTOM VALUATION	**Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994**	**IMPLEMENTATION PERIOD** ➢ Developing countries which are not signatories of the Tokyo Round Agreement, but which have accepted the WTO, have a grace period of five years before applying the provisions of the Agreement. ➢ Developing countries which are not signatories of the Tokyo Round Agreement but which have accepted the WTO, have - over and above the five years mentioned above- an additional delay period of three years for the application of the Articles relating to the computed value methodology. ➢ While the system of minimum customs value is prohibited, developing countries may make a reservation to retain the system of officially established minimum values on a limited and transitional basis under such terms and conditions as may be agreed by the Committee. **TECHNICAL ASSISTANCE** ➢ Developing countries have the right to request, and obtain, technical assistance from developed countries.	➢ Request of an extension of the transitional period granted to developing countries in order to delay application of the Agreement on Customs Valuation. This extension should be granted in accordance with the relevant provisions of the Agreement, in particular Annex III, in order to enable them to acquire the necessary technical assistance and expertise to implement the Agreement without thereby affecting their comparative advantages.
DISPUTE SETTLEMENT	**Understanding on Rules and Procedures Governing the Settlement of Disputes**	**RECOGNITION OF INTERESTS** ➢ During consultations, Members should give special attention to the particular problems and interests of developing countries. ➢ Composition of Panels: When a dispute is between a developing country Member and a developed country Member, the panel shall, if the developing country Member so requests, include at least one	➢ Panel Members should be selected from a pool of candidates representing a broad range of expertise ensuring a balance between panelists from developed and developing countries.

		panellist from a developing country Member. ➢ Panel Procedures: Where one or more members is a developing country, the panel's report shall explicitly indicate how special and differential provisions raised by the developing country have been taken into account. ➢ Surveillance of Implementation of Recommendations and Rulings: When keeping the implementation of adopted recommendations or rulings under surveillance, particular attention should be paid to matters affecting the interests of developing countries. If the case has been brought by a developing country, the Dispute Settlement Body shall consider what further action (apart from the normal surveillance mechanism) might be taken, taking into account not only the trade coverage of measures complained of, but also their impact on the economy of the developing country Member. **SPECIAL PROCEDURES INVOLVING LEAST-DEVELOPED MEMBERS**: ➢ If the dispute involves a least-developed country, particular consideration shall be given to the special situation of that country. In these cases, Members are to exercise due restraint in raising matters under the dispute settlement procedures, asking for compensation, seeking authorization for retaliation or other obligations pursuant to these procedures. ➢ If consultations involving a least-developed country fail, such country may request the Director-General or the Dispute Settlement Body Chairman to offer his good offices before a request for a panel is made. **TECHNICAL ASSISTANCE** ➢ There shall be a qualified legal expert from the WTO technical co-operation services to provide legal advice and assistance for developing countries.	➢ Cross retaliation: Retaliatory actions against developing countries, under the provisions of Article 22:3, should be taken only through suspension of obligations under the same agreement in which they have been found to be in violation, and in all fairness this situation calls for removal of the provision for cross retaliation. ➢ Panels should be authorised to recommend payment of such financial compensation in disputes between developed and developing countries where they find that as a result of WTO inconsistent measures taken by developed countries, the developing country has lost its trade in the affected product.

IMPORT LICENCES	**Agreement on Import Licensing Procedures**	**RECOGNITION OF INTERESTS** ➢ *General Provisions:* When ensuring that the administrative procedures implementing import licensing regimes are in conformity with GATT provisions and do not have trade-distorting effects, Members are to take into account the trade, development and financial needs of developing countries. ➢ *Non-automatic Import Licensing:* In allocating licences among importers, Members should give special consideration to those importers importing products originating in developing countries and, in particular, in least-developed countries. **FEWER OBLIGATIONS** ➢ To ensure transparency, Members using non-automatic import licensing regimes are to provide, upon request from other Members, all relevant information concerning the administration of restrictions, import licences granted by Members over a recent period and, where practicable, import statistics of the products concerned. Developing countries are not expected to undertake additional administrative or financial burdens in fulfilling this latter requirement. **IMPLEMENTATION PERIOD** ➢ A developing country Member which is not currently a signatory of the Tokyo Round Agreement on Import Licensing Procedures may, upon notification to the Committee, delay by a maximum of two years the implementation of the two following obligations - 1. acceptance of applications for automatic licences on any working day prior to the customs clearance of the goods; 2. the granting of automatic licences immediately on	

		receipt, or within a maximum of ten working days, provided that applications for licences are submitted in appropriate and complete form.	
PRESHIPMENT INSPECTION	**Agreement on Preshipment Inspection (PSI)**	➢ The Preamble refers only to developing countries as users of PSI. It notes that developing countries have recourse to PSI and recognizes their need to do so for so long and insofar as it is necessary to verify the quality, quantity or price of imported goods. **TECHNICAL ASSISTANCE** ➢ Exporter Members shall offer to provide to user Members - i.e. developing countries -upon request, technical assistance on mutually agreed terms on a bilateral, plurilateral or multilateral basis.	
RULES OF ORIGIN[5]	**Agreement on Rules of Origin**	This agreement does not contain any specific S&D provision.	
	Agreement on Safeguards (Relates to article XIX of GATT)	**RECOGNITION OF INTERESTS** ➢ The conditions under which imports originating in a developing country Member will be exempt from safeguard measures are specified. Two conditions are to be met: 1. The share of imports of the product from the developing country Member in the total imports of that product in the importing Member does not exceed 3 per cent; and, 2. The developing countries with less than 3 per cent	➢ Article 9.1 be amended so that safeguard measures are not applied to imports from developing countries which individually account for less than 7 per cent of total imports.

[5] See also tariff preferences, page 6

SAFEGUARDS		import share, collectively do not account for more than 9 per cent of the total imports of the product concerned in the importing Member. **FEWER OBLIGATIONS** ➢ Fewer obligations are imposed on developing countries in the following cases: 1. The general obligation that safeguard measures cannot be in place for more than 8 years does not apply to developing countries. They are permitted to maintain their safeguard measures for two years longer than the maximum allowed for others. 2. The general obligation for safeguard measures with a duration of more than 180 days is that they cannot be reimposed for at least two years, or for the time period for which they were in place, if the latter period is more than two years. For developing countries, such safeguard measures can be re-imposed after half the time period they were in place, provided the re-imposition is after at least two years.	

BACKGROUND PAPER ON SPECIAL AND DIFFERENTIAL TREATMENT IN THE CONTEXT OF GLOBALIZATION

Note presented to the G15 Symposium on Special and Differential Treatment in the WTO Agreements, New Delhi, 10 December 1998

Murray Gibbs, UNCTAD

This paper is a revision of an earlier paper prepared for the G77; it takes account of the recent debate on the issue and the papers circulated for this conference. It examines (a) the relevance of a continuation of S & D in its present form, (b) possible new forms of S & D called for by increasing liberalization and globalization.

DIFFERENTIAL AND MORE FAVOURABLE TREATMENT UP TO THE URUGUAY ROUND

"Special and differential" treatment [6] is the product of the coordinated political efforts of developing countries to correct the perceived inequalities of the post-war international trading system by introducing preferential treatment in their favour across the spectrum of international economic relations.

As early as the 1947-48 Havana Conference, developing countries (mainly Latin America at the time) challenged the assumptions that trade liberalization on an mfn basis would automatically lead to their growth and development. Their position gained greater political force with the independence of the developing countries of Asia and Africa. They argued that the peculiar structural features of the economies of developing countries and distortions arising from historical trading relationships constrained their trade prospects. This development paradigm was based on the need to improve the terms of trade, reduce dependance on exports of primary commodities, correct balance of payments volatility and disequilibria, industrialize through infant industry protection, export subsidies etc.

To a certain extent GATT rules reflected elements of this paradigm. Article XVIII of GATT, "Governmental Assistance to Economic Development", under which developing countries enjoyed additional facilities to enable them (a) to maintain sufficient flexibility in their tariff structure to be able to grant the tariff protection required for the establishment of a particular industry and (b) to apply quantitative restrictions for balance of payments purposes in a manner which takes full account of the continued high level of demand for imports likely to be generated by their programmes of economic development.

Developing countries enjoyed thus enjoyed considerable flexibility in their trade regimes, primarily due to Article XVIII:B, but also to low levels of tariff bindings,(although the latter could have been attributed to the lack of benefits received in the earlier rounds of GATT negotiations). Many developing countries acceded to GATT under Article XXVI which enabled them to largely escape the negotiations of bound tariff rates as part of their terms of accession. This flexibility was facilitated by the incorporation in 1964 of the "non-reciprocity" clause (Article XXXVI:8) of Part IV into GATT.

[6] The correct term is "Differential and More Favourable Treatment".

The UNCTAD II Conference (New Delhi 1968) led to the introduction of GSP schemes by developed countries. These were covered by a GATT waiver (not Part IV). During the Tokyo Round, developing countries' efforts to legitimize preferential treatment in their favour across the whole spectrum of trade relations resulted in the "Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries" (usually described as the "Enabling Clause"). This instrument pertains specifically to (a) GSP, (b) NTMs in the context of GATT instruments, (c) regional or global arrangements among developing countries, (d) special treatment for LDCs. The Tokyo Round resulted in enhanced disciplines in the form of detailed Codes (e.g. subsidies, technical barriers to trade, customs valuation), but these were not accepted by the majority of developing countries.

Thus, S & D treatment rested on two operational pillars:

a) Enhanced access to markets (a) through preferential access under the GSP, (b) the right to benefit from multilateral trade agreements, particularly on tariffs in accordance with the MFN principle, without being obliged to offer reciprocal concessions; (c) the freedom to create preferential regional and global trading arrangements without conforming to the GATT requirements on free trade areas and custom unions (Article XXIV).

b) Policy discretion in their own markets concerning (a) access to their market (i.e. a right to maintain trade barriers to deal with BOP problems and to protect their "infant" domestic industries), and (b) the right to offer governmental support to their domestic industries using various industrial and trade policy measures that otherwise would be inconsistent with their multilateral obligations.

Change of Direction

At the beginning of the 1980s, however, developing countries began to perceive that the positive discrimination received under S &D treatment had become outweighed by increasing negative discrimination against their trade. This was evidenced in such measures as: (a) voluntary export restraints and other "grey area" measures directed against their most competitive exports, (b) bilateral pressures by major importing countries aimed at obtaining trade concessions through the threat of trade sanctions, rather than the offer of reciprocal benefits,(c) the extension of free-trade agreements and customs unions among developed countries, (d) higher MFN tariffs on products of export interest to developing countries compared to those of interest to developed countries, (e) the proliferation of restraints on textiles and clothing exports under the Multi-Fibre Agreement; (f) the diminishing effectiveness of any GATT disciplines governing trade in agricultural products, and (g) increased harassment from anti-dumping and countervailing duties.[7] In addition, the GSP was beginning to be applied in a conditional and discriminatory fashion, being used more frequently by some preference-giving countries as a means of leverage to obtain other benefits, including measures outside the area of trade. The Tokyo Round codes, with their limited developing country membership, appeared to represent a major step towards the "GATT plus" approach, advocated in developed country circles in the early 1970s, according to which those countries

[7] These elements were clearly recognized in the resolution emerging from UNCTAD VI.

would create an inner system of rights and obligations encompassing areas of mutual interest among themselves, and were leading to active consideration of the resurrection of the so-called "conditional" MFN clause (which would place the developing countries at a serious disadvantage).

In the early 1980s, as a consequence of this perception, the thrust of the developing countries' initiatives shifted; while seeking to preserve the differential treatment in their favour, they also began to defend the integrity of the unconditional MFN clause, obtaining MFN tariff reductions, and strengthening the disciplines of GATT (particularly in the product sectors mentioned above) so as to prevent the restriction and harassment of their trade. Particular emphasis was laid on an improved dispute settlement mechanism, as a means of defense against bilateral pressures from their major trading partners. At UNCTAD VI (Belgrade, 1983), all countries recognized the need to strengthen the international trading system based on the MFN principle.[8]

Meanwhile, the acceptance by many developing countries of IMF structural adjustment programmes, their adoption of an export-oriented development model and unilateral liberalization of quantitative import restrictions and reduction of tariffs, stimulated an enhanced interest on their part in export markets. The Uruguay Round was consequently viewed as a means of obtaining improved and more secure access for their exports, consolidating the liberalization undertaken unilaterally and obtaining "negotiating credit" from the countries that were benefitting from this unilateral liberalization.

The Uruguay Round (unlike the Tokyo Round) was open only to GATT contracting parties or to countries which committed themselves to negotiate accession to GATT during the Round; a large number of developing countries followed this course of action. Many of the developing countries which acceded to GATT either immediately before or during the Round accepted to bind up to 100 per cent of items in their tariff schedules.

As a result of "single undertaking approach", the Uruguay Round Agreements have been accepted by all developing countries. The MTAs provide for S & D treatment mainly in the form of time-limited derogations, as more favourable thresholds in the application of countervailing measures and for undertaking certain commitments, greater flexibility with regard to certain obligations and "best endeavour clauses". The time-limits for such derogations run from the point in time when the WTO Agreement came into force, and will be phased out in the context of WTO Agreements by 2005.[9] Only in the Agreement on Subsidies and Countervailing Measures is such S & D treatment linked to economic criteria. In the Agreement on Agriculture, the S & D provisions will be reviewed as part of the overall reform process. The experience in the implementation of S&D measures in the WTO has been

[8] For example, in resolution 159(VI), para. 14.

[9] There are only few exceptions under which developing countries, and particularly LDCs may obtain an extension of the transition periods. LDCs may, under the TRIPS Agreement, if their request is "duly motivated", obtain extension of the transitional arrangements. Developing countries may also request the Council for Trade in Goods to extend the transition period for the elimination of TRIMs. Under the Agreement on Subsidies and Countervailing Measures, LDCs and low-income developing countries (less than $1,000 per capita) are exempt from the prohibition of export subsidies contingent upon export performance, while others must phase out export subsidies over an eight year period,,i.e. by the end of 2003. However, a developing country may request an extension of this eight-year period from the Committee on Subsidies and Countervailing Measures.

extensively documented and reviewed in the excellent paper submitted by the delegation of Egypt.

As this Egyptian paper clearly documents, a large number of S&D provisions were incorporated into the Multilateral Trade Agreements (MTAs). However, this was accomplished in a somewhat ad hoc manner, not as a result of an underlying consensus as to how the trade needs of developing countries emanating from the development paradigm should be reflected in trade principles and rules. On the contrary this earlier paradigm did not enjoy a consensus even among developing countries, it was viewed as ideological baggage from the past by some, or described as a crutch which developing countries no longer needed and which was actually hindering their competitiveness. S & D was thus considerably eroded during the UR, because it was addressed separately in each negotiating group without an underlying conceptual framework. There was no overall consensus as to the trade measures required by developing countries as essential elements of their development programmes.

The challenge facing developing countries in future negotiations would seem twofold, (a) to maintain existing S&D measures where these are crucial to the success of development programmes, and (b) adapt the concept of S&D to the realities of globalization and liberalization.

IS S&D OUTMODED?

The arguments against S&D tend to emphasize the differences among developing countries with respect to their resource endowments, their production capabilities, their economic and social institutions and their capacities for growth and development. It is claimed that while some are economically weak, lacking the human and the material resources on which to base a sustained strategy of economic and social development; others have reached the "take-off stage" where the economy begins to generate its own investment and technological improvement at sufficiently high rates so as to make growth virtually self-sustaining; others are seen to advance further to a stage of increasing sophistication of the economy and are "driving to maturity". These categories are used to justify graduation and to abandon S&D.

However, what appears to have changed is more the political attitudes to S&D than the underlying reality. Some developing countries are joining the group of those economies which are "driving to maturity"; and in the case of a few of these, the economic disparity between them and developed countries is shrinking. However, in general, the disparity in per capita income between developed and developing countries has actually increased since 1980, and many developing countries have fallen into the "least developed" category. In addition, many newly independent "countries in transition" would fall into the GATT definition of a "less developed" country, in that they "can only support low standards of living". In fact, many of the developing countries "driving for maturity" have had their vulnerability and developing country status rudely demonstrated by recent events.

Article XVIII

Pressures have successfully been applied on a number of more advanced developing countries to disinvoke Article XVIII:B of GATT which permits under certain circumstances a developing country to apply quantitative restrictions or tariff surcharges for balance of payments purposes. The Republic of Korea gave up the benefits afforded to developing

countries by Article XVIII during the Uruguay Round. It was followed by other countries, including Peru, Argentina and Brazil. India's resistance to this pressure led to it being brought before the dispute settlement mechanism of the WTO.

ACCESSION OF DEVELOPING COUNTRIES

Developing countries acceding to the WTO are facing difficulties in their attempt to benefit from some of the S & D provisions of the MTAs. In the present climate of "roll-back" of S&D treatment, even the negotiation of transitional periods is proving difficult in the accession negotiations. For example, the position of the Office of the United States Trade Representative (USTR) is that all transition periods in WTO Agreements should expire no later than 2005.[10] Not only are they being asked to forego the S&D provisions of the MTAs, but are even being required to accept obligations going beyond those of the original WTO members.

REGIONAL TRADE AGREEMENTS

A strong emphasis on reciprocity has emerged in North-South trade relations. Unilateral preferential schemes are being replaced by reciprocal free trade agreements. In NAFTA, for example, Mexico, previously a GSP beneficiary in Canada and the United States, has accepted roughly the same obligations as those countries (qualified by a series of reservations in the Annexes). The FTAA would establish a reciprocal free trade area for the whole hemisphere. The preferential schemes of the EU in favour of individual developing countries in the Mediterranean are being replaced by bilateral free trade agreements, which, building upon a system of cumulative rules of origin, aim at establishing a free trade area for the whole Mediterranean basin. While these agreements are reciprocal in the sense that the developing countries are committed to eliminate tariffs and other trade barriers, they benefit from measures on the part of the EU to encourage investment and upgrade their supply capacity. The Lomé Convention itself is presently covered by a waiver in the WTO and an intensive debate is underway as to how to eventually convert the Lomé Convention into a free trade area (or a series of FTAs) in the sense of GATT Article XXIV. At the same time, groups of ACP countries are intensifying their efforts to form effective sub-regional groupings, with the support of the EU.

Sub-regional free trade areas and customs unions among developing countries are expanding and deepening in Asia, Latin America and Africa. As stressed in the paper submitted by Zimbabwe, sub-regional groupings greatly enhance the negotiating leverage of their members in trade negotiations. They also provide an economic space, sort of a training ground for their manufacturing and services industries to build up their capacities. In certain cases, this integration process is encouraged by GSP donors, notably through the application of cumulative rules of origin. However, in other cases, the most successful sub-regional grouping among developing countries, notably MERCOSUR, have come under attack from the developed countries.

[10] USTR Strategic Plan, FY 1997-FY 2002, Office of the United States Trade Representative, 30 September 1997.

S&D IN FUTURE TRADE NEGOTIATIONS

In these circumstances, application of the principle of S & D in future trade relations and, in particular, in multilateral trade negotiations, seems to have been called into question. The following paragraphs address this question by examining (a) the relevance of a continuation of S & D in its present form, (b) possible new forms of S & D called for by increasing liberalization and globalization.

Access to markets

Tariffs

Although the progress in multilateral tariff liberalization and the extension of the regional agreements among developed, and between developed and developing countries has and will continue to erode preferential tariff margins, GSP and other unilateral schemes are needed to maintain access to markets and to reduce marginalization. All developing countries cannot participate in North-South free trade areas, and thus GSP treatment should be maintained or extended to ensure that the most vulnerable of them are not adversely affected, and that their access conditions are maintained (e.g. "NAFTA parity"). This process of conversion of unilateral schemes into FTAs could have the effect of eroding the efforts of developing countries to consolidate sub-regional integration agreements, and have the effect of exacerbating distortions of trade flows along North-South lines. Therefore S&D in the sense that North-South regional FTAs do not necessarily have to involve reciprocity by the developing countries should be established as a principle. Developing countries should have the opportunity to share in the dynamism demonstrated in the import growth of certain developing countries, thus the GSTP should be expanded within the framework of the "enabling clause".

The GSP can also play an important role in sectors where it has so far been applied on a very limited scale. The tariffication of QRs, VERs, etc. in the agriculture sector, and the high mfn tariffs in the textiles and clothing sector provide an opportunity for meaningful preferential tariff margins, and/or special tariff quotas which could provide a major impetus to the trade of developing countries.

Increasing tariff rates on imports from developing countries (whether termed "graduation" or otherwise) defies the basic logic of the value of free trade. It has never been successfully demonstrated that withdrawing GSP treatment from one developing country can stimulate the exports of another; nor is there any evidence that GSP benefits have dissuaded countries from participating in further trade liberalization at the multilateral or regional levels. From this perspective, it would seem that GSP treatment should only be withdrawn on the basis of safeguard-clause type of economic criteria based on injury caused to the donor country industry. Multilaterally agreed economic criteria could be developed for such competitive need or safeguard measures, as has been done in the Agreement on Subsidies and Countervailing Measures. In this sense, it would seem logical that the GSP should be "grandfathered".

Market Access under the MTAs

In terms of market access, certain MTAs (e.g. Agreement on Subsidies and Countervailing Duties) provide thresholds under which imports from developing countries cannot be subjected to countervailing duties. New thresholds might be negotiated in the MTAs,

notably in the Agreement on Anti-Dumping where thresholds in favour of developing countries comparable to those in the Agreement on subsidies and countervailing duties could reduce the scope for trade harassment by protectionist interests. The paper submitted by India contains specific proposals for raising these thresholds.

While the transitional periods will result in most S & D treatment in the form of exemptions from the obligations being phased out by 2005 (with the exception of rules on export subsidies), Article XVIII, Part IV and the Enabling Clause remain as integral parts of GATT 1994. S & D treatment can be pursued through seeking extension and revision of the relevant provisions of the MTAs in the context of the "built-in" agenda. As noted above, the Agreements themselves foresee the possibility that the transition periods could be extended, e.g. subsidies, TRIMs, etc. In other Agreements, the experience with the S & D provisions may be such as to indicate that there could be considerable room for improvement. The papers submitted by India and Egypt make specific suggestions in this regard.

The documentation of developing countries' experience with the operation of the S & D provisions in the MTAs will provide elements for specific proposals for improvements and/or extension of S & D treatment which could support the proposals in the Egyptian and Indian proposals. There is a need to monitor the concrete measures taken by developed countries to implement each one of the S&D provisions and link their implementation with the obligations contained in the agreements as well as real trading opportunities.

Key areas can be identified in the area of TRIMs, agriculture and subsidies. In TRIMs, future initiatives under Article 9 of the Agreement seem likely to include (a) proposals on extending the prohibitions on local content and trade balancing requirements to cover measures not presently contrary to GATT rules, (b) proposals to introduce provisions for market access (establishment) and national treatment. In agriculture, the issue arose during the Uruguay Round of the different impact of agricultural trade liberalization as between developing countries with the large majority of their populations employed directly or indirectly in the agricultural sector, and those (mainly developed) where such employment is well under 10 per cent.

In the case of subsidies, the Indian and Egyptian papers have pointed out that there would appear to be a bias against developing countries. The non-actionable categories are those most available to developed countries, while subsidies of key importance to developing countries fall in the actionable category. Furthermore, the non-actionable nature of the R&D subsidies permits firms in developed countries to have access to subsidies for the development of new products, for which they are subsequently given a monopoly under the TRIPs Agreement. In addition, the fiscal investment incentives offered by developed country governments to attract investment, often at sub-national levels are not effectively disciplined . As the continuation of the non actionable category requires consensus, developing countries have the opportunity of correcting this imbalance.

Trade in Services

The GATS establishes a different approach to S&D than other MTAs. The GATS structure provides for the integration of development objectives throughout the text of the Agreement. Market access and national treatment are negotiated concessions relating to a particular service sector/subsector on the basis of a positive list approach to allow for a more gradual liberalization, and the possibility for tradeoffs and obtention of reciprocal benefits.

Moreover, Article XIX.2 provides for flexibility for developing countries for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and when making access to their markets available to foreign services suppliers, attaching to such access conditions (e.g. transfer of technology, training, etc.) aimed at achieving the objectives referred to in Article IV on Increasing Participation of Developing Countries. Article IV.1 provides that the increasing participation of developing country Members in world trade shall be facilitated through negotiated specific commitments, by different Members... relating to: (a) strengthening of their domestic services capacity and its efficiency and competitiveness, inter alia, through access to technology on a commercial basis; (b) the improvement of their access to distribution channels and informational networks; and the liberalization of market access in sectors and modes of supply of export interest to them.[11]

Experience so far suggests that the structure of the GATS has proven to be of greater utility to developing countries than declarations in their favour, such as GATS Article IV, which have not to date been effectively implemented.

The Annex on Telecommunications which provides for access to and use of public telecommunications transport networks and services for the supply of a service included in member's schedule of commitments, also recognizes the essential role of telecommunications for expansion of trade in services of developing countries and provides in section 6(c) and (d) that members shall make available, where practicable, to developing countries information with respect to telecommunications services and developments in telecommunications and information technology to assist in strengthening their domestic telecommunications services sector. Members shall give special consideration to opportunities for the least-developed countries to encourage foreign suppliers of telecommunications services to assist in the transfer of technology, training and other activities that support the development of their telecommunications infrastructure and expansion of their telecommunications services trade.

The GATS thus contains concepts which foresaw the type of S&D treatment required in the context of globalization. The GATS also legitimizes investment performance requirements, measures which have been attacked in the TRIMs Agreement and particularly in the MAI.

The Enabling Clause

Preserving and adapting S&D in future negotiations would involve recognition that the basic elements of the "Enabling Clause" are still relevant and could be consolidated by their restatement and adaptation to the current context. This would entail:

a) recognition that GSP treatment should not be "rolled back", i.e. that access provided under GSP should be maintained (although "competitive need" criteria could be applied); in a world where target dates for free trade have been set for APEC and in the Western Hemisphere, and the possibility of

[11] The negotiations on movement of natural persons have so far yielded limited results. Access to distribution channels and information networks e.g. CRS and technology has not yet been facilitated.

"global free trade" is being seriously discussed, it would seem incongruous to impose higher tariffs on poorer countries on the basis of "graduation".[12]

b) extension of the time limits for S & D treatment in the context of the WTO MTAs where the need for such extension can be demonstrated.

c) encouragement of regional and interregional preferential agreements among developing countries under the Enabling Clause and provision to developing countries of differential and more favourable treatment in regional agreements with developed countries.

d) extension of duty and quota free access to all imports from LDCs.

Financial assistance could be an important element of S&D in future to enable countries to implement the obligations (e.g. trips) and exercise their rights (dispute settlement). There has been traditional resistance to any notion that the MTAs could include a financial window, however, practice has demonstrated that without such assistance the possibilities of many developing countries to fully meet their obligations and fully exercise their rights is very limited indeed.

"Supply Side" Measures

S & D treatment in the context of globalization should give heavy emphasis on "supply side measures" aimed at developing a competitive capacity at the national level. As the East Asian experience has shown, one of the most important aspects of special and differential treatment for assuring sustainable export growth, has been the policy discretion developing countries have been allowed to employ a variety of policy measures and incentives, targeted at specific sectors and industries, in order to foster the development of internationally competitive export supply capabilities. The success of those countries in increasing their participation in the globalizing world economy have been due largely to their successful use of policy instruments to build competitive export supply capacities and to encourage product diversification.

The tighter disciplines in the MTAs on the level and type of support (direct and indirect subsidies) that governments can provide domestic producers and exporters of agricultural and industrial products; and the reinforced disciplines on the use of certain trade-related investment measures (TRIMs) may have constrained the use of policy instruments that could be effectively applied by developing countries to develop sectors and industries with an export potential. In other cases, these policy measures may not be effective.

Future Negotiations

In future negotiations, S & D treatment could be pursued through (a) amendment of the MTAs, (b) special improvements in market access or (c) special provisions in the context of possible new rules in areas not presently disciplined by the WTO.

[12] The discussion in the GSP context appears to be out of date when viewed against the general acceptance of the benefits of trade liberalization. GSP is seen as a "burden" by donor countries, and as a loss of fiscal revenue.

As the pressure to extend the "frontiers" of the trading system continues, developing countries will undoubtedly wish to preserve their right to take certain measures as essential components of their development policies. Rather than relying on artificial and arbitrary time frames unrelated to need or performance, the expression of S&D treatment in the rule making area would, in such a case, be based on economic performance based criteria. This could involve a "carve out" for certain measures, e.g investment performance requirements which would remain "untouched" in future extensions of rules on investment, subsidies, etc. Pursuance of this approach would require a clear understanding as to what measures constituted such "essential policy measures".

The concentration of technology alliances among companies with their home base in major developed countries has become an important feature of global corporate strategies, creating the danger of exacerbating inequality of access to technology. The ability to join these networks and to ensure that membership in a network enhances knowledge accumulation and flexibility in a participating firm is thus of strategic importance for firms in developing countries. In a globalizing world economy, presence of foreign firms in the market will be crucial to the trade, industrial and other economic development objectives of the host economy, but developing countries will continue to wish to be permitted to link liberalization to transfer of technology requirements.

The existence of IPR regimes in the host countries creates a sense of security for those transferring technologies. However, the role of IPRs in technology transfer varies across industries and activities. Patents are more important for transfer in industries whose technology can be easily copied; for other industries, trade secrecy protection may be more important. For example, IPRs are regarded as an important determinant of foreign investment in industries such as chemicals, pharmaceuticals and scientific instruments. As noted below, there are a number of aspects relating to special needs and interests of developing countries, including the protection of indigenous and traditional knowledge.

S&D relating to transfer of technology appears in several provisions in e.g. GATS (Article IV, Annex on basic telecommunications) and TRIPs. In particular, the TRIPs Agreement provides in Article 66.2 that developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least developed country Members in order to enable them to create a sound and viable technological base.

The approach to S & D in the future will have to take account of the realities of globalized production and be directed to assist developing country enterprises to derive benefits from and successfully confront the challenges of globalization. This would require, in addition to ensuring improved and more stable access to markets, that of obtaining access to technology, an objective which is closely related to that of access to information networks and distribution systems. S & D treatment would need to recognize the real problems that face developing countries in dealing effectively with the fact that the global strategies of TNCs may not coincide with the development objectives of developing countries, and also may contain anti-competitive elements, as well as in maximizing the development impact of FDI.

Thus, in the context of globalization, emphasis would need to be given to building up strong developing country enterprises able to compete in the world market for both goods and services. This would seem to require less emphasis on "infant industry" tariff protection and

more on subsidies and various performance requirements to encourage developing country firms to enter the world market, to underwrite some of the costs and risks of their doing so and to give them the means to compete in terms of technology and access to networks. Thus, future efforts at S & D on the "supply side", might include such elements as:

a) an extension of the 8 year transitional period for developing countries in Article 27.4 [13] of the Agreement on Subsidies and Countervailing Measures.

b) extension of the transitional periods for the phase out of prohibited TRIMs (Article 5.3 of the TRIMs Agreement would seem to open the door to such an initiative).

c) recognition of the importance of investment performance requirements for the development programmes of developing countries and their right to impose such requirements to ensure transfer of technology, export-orientation, etc.

d) recognizing the importance of joint ventures in the development of supply capacities in developing countries and that in the context of future negotiations on trade in services (under GATS Article XI.X) or under TRIMs or other investment-related negotiations, no developing country should be constrained from limiting participation of foreign capital to 49%.

e) in TRIPS, extension of the transitional periods and measures facilitating the use of compulsory licensing as a means to ensure the transfer of technology (including environmentally sound" technologies), shortening the term on patents, to bring the TRIPS Agreement into line with the Convention on Biodiversity and new provisions relating to the protection of traditional and indigenous knowledge.[14]

In summary, S & D treatment can be pursued through (i) a restatement of the four main elements of the enabling clause, adapted to current realities, (ii) a "carve out" of essential policy measures aimed at strengthening the competitiveness of developing country enterprises from the disciplines of future MTAs.

However, the success of the targeted approaches suggested above, will be uncertain without the existence of an underlying consensus, at least among developing countries as to what is the problematic of development in the face of globalization, and which are the acceptable and effective measures that developing countries should use to ensure their economic and social growth and development in the next century.

The papers submitted by India and Egypt are action oriented, focussed on specific provisions of the MTAs, but from the various problems cited in these papers, an interesting problematic emerges. The problems cited include:

[13] For developing countries which so request the Committee on Subsidies and Countervailing Measures before the end of 2002.

[14] Article 71.1 of the TRIPS Agreement provides for reviews, beginning in 2000 in the light of any relevant new developments which might warrant modification or amendment of the Agreement.

(a) the low level of industrialization in developing countries,

(b) inability to access advanced technologies,

(c) lack of domestic savings to invest,

(d) excessive dependance on primary product exports, declining terms of trade, volatility of export earnings,

(e) vulnerable BOPs situations, requiring sufficient reserves , not only to cover current imports, but for long term stability,

(f) high cost of capital, which is not taken into account for example in dumping cases against developing countries, nor in the rules on export subsidies,

(g) inefficient infrastructures, with the same implications,

(h) inefficient taxation systems in which it is difficult to calculate the rebate of indirect taxes, thus penalizing exporters, which is not taken into account in the Agreement on Subsidies (reminiscent of the “taxes occultes” debate of the late 1960's)

(i) inability to meet standards of developed countries and difficulties in preparing and enforcing the required technical regulations,

(j) import bias of foreign investors in developing countries leading to reduced positive impact of FDI , as well as BOPs problems,

(k) lack of access to distribution channels,

(l) high percentage of the population employed in the agricultural sector, mostly at subsistence levels,

(m) need to ensure food security for low income groups,

(n) lack of resources for subsidization,

(o) difficulties in protecting against theft of traditional and indigenous technologies.

What would seem required is to weave these 15 problems into a comprehensive statement of the TRADE problematique facing the DEVELOPMENT of developing countries, testing them against new developments such as electronic commerce, strategic alliances etc.

SUGGESTED DOCUMENTATION FOR FURTHER ANALYSIS

UNCTAD, *Positive Agenda and Future Trade Negotiations*, Geneva and New York, UN, 2000.

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SELECTED PROPOSALS ON S&D SUBMITTED BY WTO MEMBERS TO THE GENERAL COUNCIL IN PREPARATION FOR THE THIRD WTO MINISTERIAL CONFERENCE IN SEATTLE, 1999 (in www.wto.org)**:**

Agriculture and/or Services:
WT/GC/W/135, Communication from Egypt, 1999.
WT/GC/W/152, Communication from India, 1999.
WT/GC/W/161, Communication from Pakistan, 1999.
WT/GC/W/331, Communication from Indonesia, Malaysia, Philippines, and Thailand, 1999.
WT/GC/W/374, Communication from Cuba, Dominican Republic, Egypt, El Salvador, Honduras, Sri Lanka, Uganda and Zimbabwe, 1999.
WT/GC/W/390, Communication from Cuba, 1999.

Intellectual Property:
WT/GC/W/147, Communication from India, 1999.
WT/GC/W/302, Communication from Kenya on behalf of the African Group, 1999.

Textiles:
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On anti-dumping:
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WT/GC/W/269, Communication from Brazil, 1999.
WT/GC/W/366, Communication from Chile, 1999.

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WT/GC/W/202, Communication from India, 1999.

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Investment:
WT/GC/W/271, Communication from Brazil, 1999.

Customs Valuation:
WT/GC/W/301, Communication from Kenya on behalf of the African Group, 1999.

Dispute Settlement:
WT/GC/W/162, Communication from Pakistan, 1999.

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WT/GC/W/309, Communication from Korea, 1999.

Preshipment Inspection:
WT/GC/W/233, Communication from Kenya, 1999.

Safeguards:
WT/GC/W/313, Communication from Colombia, 1999.

On Special Safeguard:
WT/GC/W/336, Communication from MERCOSUL (Argentina, Brazil, Paraguay and Uruguay), 1999.

TRAINING PRESENTATION ON THE SPECIAL AND DIFFERENTIAL TREATMENT: AN UNCTAD ASSESSMENT